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JAMES H. McKENNEY

IN THE

Supreme Court of the United States.

No. 1407—OCTOBER TERM, 1890.

EAST TENNESSEE, VIRGINIA & GEORGIA RAILWAY COMPANY, *Plaintiff in Error,*

vs.

JOSEPH E. FRAZIER, *et als., Defendants.*

Writ of Error to the Supreme Court of the State of Tennessee.

ON MOTION TO DISMISS OR AFFIRM.

BRIEF FOR DEFENDANTS.

HENRY H. INGERSOLL,
Of Counsel.

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No. 1407.

ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

On Motion to Dismiss or Affirm.

BRIEF FOR DEFENDANTS.

No Federal Question—Matter of Fact—Construction of State Statute.

In argument in the State Supreme Court, plaintiff, in error, contended:

1st. That, under a charter of 1847, authorizing a construction mortgage, its predecessor had a vested right in 1881 to make the mortgage, by foreclosure of which plaintiff had obtained title to the predecessor's railroad property;

2nd. That an Act of 1877, authorizing the making of said mortgage of 1881, but postponing the mortgagee to judgment-creditors, impaired the obligation of said contractual charter-right to mortgage, by thus postponing the mortgage lien to the lien of judgment-creditors, like defendants, and was, therefore, repugnant to the Constitution of the United States—thus raising the only Federal question in the case.

The State Court decided:

1. That plaintiff's predecessor did have the contractual charter-right to execute a mortgage of the kind authorized in charter, to-wit: a mortgage to raise money to complete and equip its road;

2. That the mortgage of 1881, twenty-five years after the road was completed and in full operation, was not, *as matter of fact*, the mortgage authorized by its charter, but one authorized by the Act of 1877;

3. That, therefore, the Act of 1877 did not impair the charter-right of plaintiff's predecessor, and was not repugnant to the Constitution of the United States.

Defendants say there is no Federal question in the case—or, if one, it is too frivolous for argument.

STATEMENT OF CASE.

This was a bill in Chancery Court of Tennessee by judgment-creditors, against an insolvent railroad corporation (East Tennessee, Virginia & Georgia Railroad Company) and plaintiff in error, its successor by purchase at mortgage-sale of its franchises and property, asserting priority of their judgments over the mortgage.

The contention was over the validity of the mortgage under which plaintiff in error claims title, and of the statute which gave defendants' judgments priority.

Following are the material facts relative to the contention now before this court:

In 1847 the State of Tennessee granted charter of incorporation to the East Tennessee & Virginia Railroad Company, in which power was given to mortgage property and franchises for the purpose of completing and equipping its road. In 1869 the Company was consolidated with the East Tennessee & Georgia Railroad Company, under the name of East Tennessee, Virginia & Georgia Railroad Company.

In 1877 such consolidated companies were empowered by State statute to issue bonds and make mortgage to secure same, provided that no such mortgage should have priority

over judgment-creditors. In 1881 said consolidated East Tennessee, Virginia & Georgia Railroad Company made the mortgage, which in 1886 was foreclosed by sale; and plaintiff in error, East Tennessee, Virginia & Georgia Railway Company, as purchaser, succeeded to its namesake's franchises and property.

After the foreclosure-sale and purchase of said property and franchises by plaintiff in error, these defendants filed this Creditor's Bill to subject said property of said Railroad Company, in the hands of said Railway Company, to the satisfaction of their judgments, preferred to said mortgage by said Act of 1877. This was resisted by the purchaser Railway Company on various grounds, set forth in its answer, but raising no Federal question.

Defendants prevailed in the Chancery Court, and also in the State Supreme Court, to which plaintiff in error appealed the cause; and upon the final decree of that court, this writ of error is prosecuted.

Such is the case in brief, as will more fully and at large appear from the pleadings and decrees in said State courts, and also from said Railway Company's assignment of Errors and Brief in the State Supreme Court, and the opinion of said court (88 Tenn. Rept., p. 138), all of which are printed as an Appendix to this Brief, and show plainly and fully all matters drawn in question and decided in said State Supreme Court.

IN THE

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Plaintiff, in Error.
vs.
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No. 1407.

ERROR TO THE SUPREME COURT OF TENNESSEE.

MOTION.

Come now the defendant, Joseph E. Frazier, and all the other defendants in this cause, by their counsel, Henry H. Ingersoll, and move the court to dismiss the writ of error sued out in this case upon the decree of the Supreme Court of the State of Tennessee, for want of jurisdiction in this court to hear and determine the same;

And said defendants also move the court to affirm the decree in this cause, on the ground that, although the record may show that this court has jurisdiction, it is manifest that the writ was taken for delay only, and that the question on which the jurisdiction depends is so frivolous as not to need further argument.

HENRY H. INGERSOLL,
Of Counsel for Defendants.

BRIEF.

I.

There is no Federal Question in this Case.

None was suggested in the pleadings or even hinted at in the decrees of the Chancery Court. (See Appendix to Brief, pp. 14–20; 23–6; 29–34.)

None was raised by plaintiff in error in its assignment of errors, made in the Supreme Court of Tennessee, to the decree of the Chancery Court. (See App., pp. 34–41.)

None appears in the final decree of the State Supreme Court, affirming the Chancellor's decree. (See App., pp. 42–3.)

Not till the cause had been finally heard and determined in the Chancery Court, and on appeal in the Supreme Court a final decree of affirmance had been pronounced, does the record show an effort to introduce into the cause a Federal question.

The Supplemental Decree, containing the only evidence of this effort, or any allusion to a Federal question is as follows: (See App. p. 43.)

"In this cause on application of appellant, East Ten-
"nessee, Virginia & Georgia Railway Company, it is
"ordered that the decree entered on a former day be mod-
"ified as follows, this being added to and made part of
"former decree: "Upon the argument of this cause it
"was *insisted* that under the charter of the East Tennessee,
"Virginia & Georgia Railroad Company there was power
"and authority to make the mortgage of 1881, and that by
"the subsequent legislation of this State this charter power
"could not be limited or affected in any way, in that the
"charter was a contract that could not be affected by sub-
"sequent legislation, the Court decreeing that the charter
"power was limited to the execution of a mortgage to
"secure bonds issued to complete and put in operation the

"line of railway contemplated by the charter of 1847 to the "East Tennessee, Virginia & Georgia Railroad Company, "and that, it not being alleged in the pleadings or shown in "proof that the mortgages of 1881 were executed for bonds "issued to complete said road or put it in operation, or in "renewal of such bonds, that it would not therefore pre- "sume these bonds to have been issued under the limited "authority of the charter; and that the Act of 1877 did not "therefore impair the contract contained in said charter, "and was valid and not obnoxious to the Constitution of "this State, or that of the United States."

This is the sole ground of alleged jurisdiction of this Court over this cause appearing in the record.

Plaintiff in error asks this Court to reverse the decree of Supreme Court of Tennessee on the ground solely that a State law (Act of 1877) impaired the contractual charter right (Act of 1847) of its predecessor, East Tennessee, Virginia & Georgia Railroad Company to execute a certain mortgage in 1881, the validity of which law was, in argument for plaintiff in error, drawn in question in said State Court on the ground of its being repugnant to the Constitution of the United States, Art. I., Sec. 10, and the decision was in favor of its validity, viz: that said Act of 1877 was not in violation of said provision of the Federal Constitution. There is no color for contention for any other Federal question in the case; and this one is *colorable* only.

The pivotal question in the case was the relative priority of the title of plaintiff in error as purchaser under foreclosure of said mortgage of 1881, and defendant's judgments against the mortgagor Railroad Company.

Defendants *did* rely for priority upon said Act of 1877, which contained a provision that no railroad mortgage executed under it should be valid and binding against such judgments as defendants'. Plaintiff in error did insist "that "under the charter of the East Tennessee, Virginia & "Georgia Railroad Company there was power and authority "to make the mortgage of 1881; and that by the sub-

"sequent legislation of the State this charter power could "not be limited or affected in any way, in that the charter "was a contract that could not be affected by subsequent "legislation."

But even this Supplemental Decree does not recite that plaintiff in error insisted that any particular State law had impaired its charter-power; it can only be inferred from the decision of the Court that it was the Act of 1877.

The Court did decide the case and did decree in favor of defendants and against plaintiff in error.

But the Court did *not* decide, either that the asserted charter right to mortgage was not contractual; nor that the State might by subsequent legislation impair the obligation of the contract, but obviously rather to the contrary,—conceding to plaintiff in error the soundness of the constitutional contention of its counsel.

The decision adverse to plaintiff in error was distinctly placed by the Court upon other grounds, foreign to the constitutional contention and to any Federal question, and invoking only principles of general or State law, as plainly expressed in said supplemental decree, entered at request of plaintiff in error, so as to give color for this writ of error: "The Court, decreeing that the charter power was limited, "* * * * would not presume these bonds to have been 'issued under the limited authority of the charter; and "that the *Act of 1877 did not therefore impair the contract* "*contained* in said charter, and was valid."

In fine: Plaintiff in error contended that the Act of 1877 impaired the obligation of the charter right of the Railroad Company to execute the mortgages of 1881, under which it claimed title and priority over defendants.

The State Court decided, *as matter of fact*, that the mortgages of 1881 were not executed under charter-right and power, but under power conferred by the very Act of 1877, impeached by plaintiff in error as unconstitutional; and that therefore no vested right of plaintiff in error, as purchaser under said mortgage of 1881, was impaired by the Act of 1877.

Thus construing a State law the State Court declared that plaintiff in error, a State corporation, *did not have* the vested right which it contended had been impaired by subsequent legislation; and that therefore the State statute did not (could not) impair it; and therefore the statute was valid.

Though a Federal question was raised and presented in argument to the State Court, it was not decided, nor was decision thereof necessary to the decree. Though the State statute was declared valid, this declaration was a mere abstraction; it did not affect plaintiff's right. Having decided that the charter did not give the particular mortgage-right contended for, and that, *in fact*, the mortgage was made under the Act of 1877, the question whether this right had been impaired by the Act of 1877 was *coram non judice*. In short: this is not "a decree in the Court of a State "where is drawn in question the validity of a statute of the "State on the ground of its being repugnant to the Consti-"tution of the United States."

Commercial Bank vs. *Buckingham*, 5 How. 341.
Beatty vs. *Benton*, 135 U. S. 244.

The decree of the State Supreme Court is therefore final and not subject to review or reversal in this Court.

Atty. Gen'l vs. *Fed. St. Meeting House*, 1 Black 262.
Robinson vs. *Coulter*, 16 How. 106.
Kennebeck R. R. vs. *Portland R. R.*, 14 Wall. 23.
Smith vs. *Adsit*, 16 Wall. 185.
Murdock vs. *Memphis*, 20 Wall. 590.
Bolling vs. *Lersner*, 91 U. S. 594.
Crossley vs. *New Orleans*, 108 U. S. 105.
Susq. Boom Co vs. *West. Br. Boom Co.*, 110 U. S. 57.
Chouteau vs. *Gibson*, 111 U. S. 200.
Adams Co. vs. *Burlington R. Co.*, 112 U. S. 123.
De Saussure vs. *Gaillard* 127 U. S. 216.
Hopkins vs. *McLure*, 133 U. S. 380.
Blount vs. *Walker*, 134 U. S. 607.

II.

But if this Court has jurisdiction the writ is for delay only, and the Federal question is so frivolous as not to need further argument.

Did the Act of 1877 impair the charter-right to make the mortgage of 1881?

Surely not unless the charter gave the right to make this mortgage.

Did the charter give that right?

Plaintiff in error did not so allege in its answer in the Chancery Court. And after adverse decree therein and appeal therefrom to the Supreme Court, it did not in its assignment of errors and brief filed therein (See App. pp. 34–40), claim such a right.

(*Endow't Ass'n* vs. *Kansas*, 120 U. S. 103.)

And when, upon argument in the Supreme Court, it did insist upon this charter-right the Supreme Court decreed, (See App. pp. 43) "that the charter power was limited to "the execution of a mortgage to secure bonds issued to "complete and put in operation the line of railway contem- "plated by the charter of 1847 to the East Tennessee, Vir- "ginia & Georgia Railroad Company; and that it not being "alleged in the pleadings or shown in the proof that the "mortgages of 1881 were executed for bonds issued to com- "plete said road or put it in operation, or in renewal of "such bonds, that it would not therefore presume these "bonds to have been issued under the limited authority of "the charter, and that the Act of 1877 did not therefore im- "pair the contract contained in said charter, and was valid "and not obnoxious to the Constitution of this State or "that of the United States."

But if the failure of plaintiff in error to claim this right and the inability of the State Court to see it, is not enough; and its decision of this question of fact is not conclusive, but this Court may review that decision to see whether this particular mortgage was made under charter-power, then to

aid the Court in that review, the XV Section of said charter, the only one relied on for mortgage-power is here to the Court shown, together with the opinion of the State Court thereon:

(*Kreiger* vs. *Shelby R. R. Co.*, 125 U. S. 89.)

"SEC. 15. The said Company may at any time *increase* "*its capital to a sum sufficient to complete the* said road, *and* "*to stock* it with everything necessary to give it *full opera-* "*tion*, and effect, *either* by opening books for *new stock*, or "by *selling* new stock or *by borrowing money on the credit of* "*the Company, and on the mortgage of its charter and works;* "and the manner in which the same shall be done in "either case shall be prescribed by the stockholders at a "general meeting. And any State, or any citizen, corpora- "tion or company, of this or any other State or country, "may subscribe for and hold stock in said Company, with "all the rights, and subject to all the liabilities of any other "stockholder." (See App. p. 6—Acts 1847–8, p. 198.)

Construing this charter, the Supreme Court of Tennessee declares: (See App., pp. 6–7.)

"The power here conferred is limited to one purpose, that of *completing its road*, and *equipping* it with everything necessary to give it "*full operation.*" This road was completed and in full operation for perhaps twenty-five years before the execution of the mortgages in question; and it is nowhere pretended in the pleadings or proof that either of these mortgages were executed for the purpose of completing or putting into "full operation," the line of road contemplated and authorized by the charter of the old corporation of the E. T. & V. R. R. The power of a railway corporation to execute a mortgage of its franchises, or of corporate property, essential to its operation, must, by the great weight of authority, be expressly conferred. Such a power is generally implied where the corporation is one strictly private, as a factory or mill. The reason for the distinction is found in the nature of the obligations and duties imposed upon a corporation, in many respects a public corporation. Such a corporation can not without express authority abdicate

the functions and duties imposed for public purposes by either a sale or lease. For the same reason, it may not make a mortgage; for a foreclosure would bring about a sale and abandonment of its powers and responsibilities. Jones on Railroad Securities, Sec. 1 to 10 inc. Mallory v. Oil Works, 86 Tenn., 603. Thomas v. Railroad Comp., 101 U. S., 71.

"We are of the opinion that the limited power conferred in the charter was not sufficient to authorize the issuance of bonds and execution of a mortgage for any other purpose than that of completing and equipping the original lines contemplated and authorized by the charter; and that mortgages executed more than twenty-five years after the completion and equipment of the line of the road authorized by the original charter, and not purporting or shown to be for any such purpose, or to secure renewal of bonds originally issued for such purpose, will not be presumed, in the absence of proof or allegation, to have been executed for the purpose named in such charter."

Moreover, the Act of 1877, preferring judgment-creditors for materials furnished, work and labor done and damages to persons and property, to mortgagees under railroad mortgages thereafter to be executed, was but the proper exercise by the State of its inalienable police power, to which all citizens are subject, and not a deprivation of the charter-right of the Railroad Company to mortgage its property.

R. F. & P. R. R. Co. vs. *Richmond*, 96 U. S., 521.
Prov. Inst. vs. *Jersey City*, 113 U. S., 506.
Mugler vs. *Kansas*, 123 U. S., 623.

The Act did not deprive or destroy, but only regulated. And plaintiff in error, claiming under a mortgage made and accepted in 1881, in pursuance of said Act of 1877, is in no plight to make constitutional objection to its operation, even if there had been a charter-right to make this mortgage, under which it claims title.

But there was no charter-right to make this mortgage. It was made under the Act of 1877, regulating the exercise of

mortgage-power by railroads. Neither in pleading or proof did plaintiff otherwise assert, but relied entirely upon other defenses. Obviously this claim to Federal protection set up *in extremis* is colorable and for delay only.

Wherefore defendants respectfully submit that their motion should be allowed, and either a dismissal or an affirmance ordered by the Court.

HENRY H. INGERSOLL,
Of Counsel for Defendants.

APPENDIX.

IN SUPREME COURT OF TENNESSEE.

J. E. FRAZIER

vs.

E. T., V. & G. R. R. Co.

AND THE

E. T., V. & G. RAILWAY CO.

OPINION.

[*88 Tenn. Rep. p. 138.*]

Sometime prior to 1860 there existed two separate railroad corporations, one known as the East Tennessee & Virginia Railroad Company, and the other as the East Tennessee & Georgia Railroad Company. Each owned and was operating an independent line of railway, under charters granted by this State. Under the Internal Improvement Acts of 1851–2, State bonds to a large amount were loaned to each Company, and thus each became largely indebted to the State. By an Act passed February 25th, 1869, railroad companies so indebted were permitted to consolidate and adopt the name and charter of either of the consolidating companies. Under this Act these two corporations consolidated, adopting the name and charter of the East Tennessee & Virginia Railroad. Subsequently, by an Act passed December 17, 1869, this consolidation was recognized, and the name of the consolidated company changed to East Tennessee, Virginia & Georgia Railroad Company. On June 15, 1881, this consolidated company executed to the Central Trust Company of New York a mortgage to secure an issue of Twenty-two Millions of its bonds. This mortgage was known and described as its "Consolidated First Mortgage," and all the corporate property and franchises of the consolidated company, including certain other roads either purchased or built after the consolidation above referred to, were included therein.

On the same day another mortgage, known as the "Income Mortgage," was executed to the same Trustee, to secure Sixteen and one-half millions of bonds known as its "Six per cent. Income and Mortgage Bonds." All the corporate property and franchises of the Company were conveyed herein, subject, however, to the "Consolidated First Mort-

gage," and *in addition the income* of the road was pledged. Default having been made in the payment of interest upon the bonds thus secured, such proceedings were had in the United States Circuit Court for the Eastern Division of Tennessee, as resulted in the sale of the mortgaged property and franchises. The purchasers at the sale were a committee of the holders of the bonds duly authorized to purchase as trustees for the creditors. This committee bid in the entire property for the sum of Ten Millions of Dollars. Of this sum One Hundred Thousand Dollars were paid in cash, the remainder of the bid being paid in bonds of the Company under a scheme agreed upon by the holders of bonds. The title was by deed and decree conveyed to the purchasers. Subsequently these purchasers, by virtue of an Act passed March 12, 1877, "organized as a corporation and adopted the name of the East Tennessee, Virginia & Georgia Railway Company."

After this reorganization the purchased roads were regularly conveyed to the new organization by the persons in whom the legal title stood, for the nominal consideration of Ten Dollars.

This foreclosure sale occurred May 25, 1886, and the other proceedings shortly after and during the same year.

Complainant, claiming to be a creditor of the old and insolvent corporation, files this bill under the provisions of Sections 1492–6, 4168, 4294–5 of Code. The old corporation, as well as the new, are the parties defendant. The bill is filed upon the theory that under the law of this State at the time the foreclosed mortgages were executed, regulating the execution of mortgages by railroads in this State, that the East Tennessee, Virginia & Georgia Railroad Company had no power to make a mortgage of its property in this State, which should be valid against judgments for timber furnished, or work and labor done, or for injuries to persons or property incurred in the operation of the road in this State; and that the property of the insolvent and debtor corporation in the hands of the reorganized corporation, is subject to the demands of all such creditors, the purchasers thereof having no other or higher title than the mortgagees had.

The bill is filed under Sections 4294–5 and 3431 as a creditors bill to reach and subject assets of an insolvent corporation, and apply them equally to all creditors of the preferred class. A large number of creditors having judgments unsatisfied, for injuries sustained in the operation of the old road, or work and labor or timber furnished, have come in by petition and been allowed by interlocutory order to become co-complainants in the original bill.

The learned Chancellor, upon the whole case, decreed as follows:

1. That complainant was a creditor, and as such was entitled to judgment and decree against the E. T., V. & G. R. R. Co.; and that his claim was for injuries sustained in the

operation of said railway in this State after the execution of the foreclosed mortgages and while the road was being operated by the mortgagors.

2. That the E. T., V. & G. R. R. Co. was an insolvent corporation, and that since June, 1886, it had parted with all of its property and franchises and had ceased to perform its functions as a common carrier, and that complainants have no means at law of obtaining satisfaction of their several demands, unless they may compel satisfaction from the property of said corporation in the hands of the new organization.

3. That the mortgages of June, 1881, under which the new Company claims title, were subject to the provisions of the Act of March 24, 1877, by which Act said Company was prohibited from making any mortgage or creating any lien superior to claims of the class to which complainants belong.

4. That the East Tennessee, Virginia & Georgia Railway Company is not an innocent purchaser.

5. That a receiver should be appointed and empowered to take possession and sell a sufficiency of the property of the insolvent debtor corporation, owned by it at the date of the foreclosure sale, and situated in this State, and now in the possession of the reorganized company, to satisfy the several judgments determined in this case to be entitled to priority over the mortgages of June, 1881.

From this decree, the East Tennessee, Virginia & Georgia Railway Company have appealed and assigned errors upon each of the several matters so decreed.

The original complainant, Frazier, has likewise appealed from so much of the decree of the Chancellor as held that his claim should be abated by the sum of $1,491.00.

We will first dispose of the first assignment of errors filed by the Railway Company, which challenges the character of Frazier's claim, and insists that it is neither for damages to his person, or for work and labor, but for a breach of contract, and that therefore he is not a creditor of the class entitled to invoke the provisions of the Act of 1877.

Frazier, in January, 1883, was an engineer in the service of the old corporation and was badly injured by the overturning of an engine.

On the 9th of August thereafter he entered into a contract with the company for the settlement of his claim for damages thus sustained. This contract is too lengthy to here set out. Its substance and legal effect was, that the company on its part agreed to pay him the sum of $90.00 per month for five years. He, on his part, agreed to do such work in the shops of the company as he should be called upon to do and which he might be physically able to do, If any question should arise as to his ability to do the work. then it was agreed that Dr. Deaderick should settle such question, and if he should decide that complainant was able to do the work required then his payments should be abated

for the time so lost. The contract further provides that all his medical bills should be paid by the company, and that the sum of $1,800 should be paid to him as an advance payment upon the contract.

In consideration of the foregoing Frazier released the company from all liability for any damage he might otherwise recover. For several months he was regularly paid the agreed sum of $90.00 per month. But when the road passed into the hands of a receiver he was notified that his name had been dropped from their pay-rolls. Thereafter he was paid nothing more. Neither before or after this action of the Receiver was he ever called upon or required to render any service. During the time he was paid, he was utterly unable to render any service, and for the greater part of the remainder of the period covered by the contract he continued to labor under disabilities so serious as to have made it physically impossible that he should render any service in the shops of the company. After his payments were stopped it is shown that for a part of the time he engaged himself in the management of a small family grocery, and that the service he was able to render was such as could probably have been procured at $35.00 per month.

The Chancellor was of opinion that his monthly claim should have been abated to the extent that he had been able to make earnings in this avocation, and accordingly he abated the gross sum due by $1,491. We are of opinion that the sum agreed to be paid complainant under this contract was in liquidation of his claim and right of action for personal injuries. The agreement that he should, if able, render service in their shops, if called upon, was a mere incident of the settlement, and the sums agreed to be paid him are not for work and labor, but as agreed payments in liquidation of damages to be reduced by the value to them of his services to them in their shops, if he should ever be called upon to so labor and should be physically able. This demand is therefore one for personal injuries. We think it was error to abate his claim by the value of his labor in his own store. He was never called upon to perform any labor for defendant and was unable if he had been to have rendered service in their shops for any considerable part of the time. He was under no obligation whatever to remain idle. If there was work of a kind which he could do, he was clearly entitled to its fruits, as it was not earned at the loss of time to defendant. His time and labor belonged to himself, unless he was able to work in their shops and wrongfully refused to so work when called. To save himself and family from want he was compelled in pain and suffering to engage in the little business he undertook. If defendant had kept its contract with him he would not perhaps have been driven to the necessity he was. It does not lie in the mouth of the defendant to say under these circumstances that it was entitled to his time.

The assignment of error as to this matter is sustained and

judgment will go for the full amount of the monthly payments in arrears.

We now come to the principal question which involves the right of complainants as judgment creditors, the judgments being mainly for personal injuries sustained in the operation of the road in this State, to satisfaction out of the property of the old corporation in the possession and ownership of the East Tennessee, Virginia & Georgia Railway Company.

We have already stated the title of this company. It is most manifest that the defense of innocent purchasers without notice cannot be sustained. They must stand or fall upon their title as mortgagees. The proceedings in the foreclosure suit are not plead or relied upon in bar of the claim now presented, though a demurrer as well as the answer interpose the defense that the remedy of complainants was against the purchase money. There are two answers to this. The purchase money was never paid, save in bonds, except a comparatively small sum necessary to pay costs and counsel fees. Second, the foreclosure proceedings do not undertake to clear the title of the property sold, and no steps seem to have been taken to bring creditors of the class represented by complainants before the Court. If, therefore, the mortgages, under which the reorganized company acquired title were invalid as to the judgments of complainants, we see no difficulty in a court of equity following the property and subjecting it to the hands of any but innocent purchasers, to the satisfaction of their prior liabilities. Any liens placed upon the property by the new company are not affected by any decree in this cause in as much as the holders are not parties and are therefore not included. We only decide that the *corporation* is not an innocent purchaser, and its assignment of errors to this effect is not well taken.

The claim of priority in favor of judgments of complainants is rested in the bill upon a provision in the Act of March 24, 1877, in the following words:

"And *provided further*, that no Railroad Company shall have power under this act or any of the laws of this State, to give or create any mortgage or other kind of lien on its railway property in this State, which shall be valid and binding against judgments and decrees and executions therefrom, for timbers furnished and work and labor done on, or for damages done to persons and property in the operation of its railroad in this State."

The Railway Company interposes a number of objections going both to the applicability and constitutionality of this provision, to the mortgages under which they claim title. The first is, that under the charter of the old company it had power to mortgage, and that this general power conferred in their charter is a contractual right which could not be affected by any subsequent legislation limiting the power conferred. The charter has not been made a part of the

transcript, and it is insisted by complainants that it is not such an enactment, being a special charter, as entitles us to take judicial notice of its terms. This charter is not a mere private Act. It was granted in 1847, and is published as a public Act, with the other public Acts of that session. Acts of 1847–8, p. 195. It has has been since more than once referred to in other public Acts. Such an Act is entitled to judicial notice. Perry vs. N. O. R. R., 55 Ala., 413. Hill & Brown, 58 N. H., 93. Wharton on Evidence, Sec. 294.

The 15th section of the charter granted to the East Tennessee & Virginia Railroad is the only section relied upon as containing the grant of power to issue bonds and mortgage its property. This section is as follows:

"SEC. 15. The said Company may at any time *increase its capital to a sum sufficient to complete* the said road, *and to stock* it with everything necessary to give it *full operation*, and effect *either* by opening books for *new stock*, or by *selling* new stock, or *by borrowing money on the credit of the company, and on the mortgage of its charter and works;* and the manner in which the same shall be done and in either case shall be prescribed by the stockholders at a general meeting. And any State, or any citizen, corporation or company of of this or any other State or country may subscribe for and hold stock in said Company, with all the rights, and subject to all the liabilities of any other stockholder."

The power here conferred is limited to one purpose, that of *completing its road* and *equipping* it with everything necessary to give it "*full operation.*" This old road was completed and in full operation for perhaps twenty-five years before the execution of the mortgages in question, and it is no where pretended in the pleadings or proof that either of these mortgages were executed for the purpose of completing or putting into "full operation" the line of road contemplated and authorized by the charter of the old corporation of the E. T. & V. R. R. The power of a railway corporation to execute a mortgage of its franchises, or of corporate property, essential to its operation, must, by the great weight of authority, be expressly conferred. Such a power is generally implied where the corporation is one strictly private, as a factory or mill. The reason for the distinction is found in the nature of the obligation and duties imposed upon a corporation in many respects a public corporation. Such a corporation cannot without express authority abdicate the functions and duties imposed for public purposes by either a sale or a lease. For the same reason, it may not make a mortgage, for a foreclosure would bring about a sale and abandonment of its powers and responsibilities. Jones on Railroad Securities, Sec. 1 to 10, inc. Mallory v. Oil Works, 86 Tenn. 603. Thomas v. Railroad Comp., 101 U. S., 71.

We are of the opinion that the limited power conferred in the charter was not sufficient to authorize issuance of bonds and execution of a mortgage for any other purpose than that of completing and equipping the original lines con-

templated and authorized by the charter; and that the mortgages executed more than twenty-five years after the completion and equipment of the line of the road authorized by the original charter, and not purporting or shown to be for any such purpose, or to secure renewal of bonds originally issued for such purpose, will not be presumed in the absence of proof or allegations to have been executed for the purpose named in such charter.

The next objection is that the proviso in the Act of 1877 is obnoxious to Sec. 17 Art. II of the State Constitution, which provides that "no bill shall become a law which embraces more than one subject, that subject to be embraced in the title."

The title of the Act of March 24, 1877, is "An Act to amend the law in relation to the consolidation of railways."

The first section amends the Acts of Dec. 12, 1871, and March 12, 1875, by extending those acts to all railroad corporations "now existing or hereafter to be created in this State, whether under a general or special law or laws, or by virtue of statues of any other State ratified and confirmed by the authority of the State of Tennessee."

The second section authorizes any corporation existing or hereafter to be created under the laws of this State, or any other State, ratified by this, to consolidate itself with any other railroad whose lines shall connect with or intersect the road of such corporation desiring consolidation.

The the third section defines the right and powers of the consolidated roads. Among other powers conferred upon the consolidated companies is that of issuing bonds, and to secure same by a mortgage upon its property and franchises.

Three *provisos* are included in this third section. The first declares that "nothing in this Act shall be understood or construed to give or to transfer or confer upon, *any such consolidated company, or person operating such consolidation or railroads*, as provided for in this Act, *or in any other law of this State*, any franchise, right or immunity or exemption not now granted by the laws of this State to the railway companies which may form part of such consolidated company." The two following provisos and the concluding sections are as follows:

"*Provided further*, That no exemption from taxation under the revenue laws of this State, of railroad property, and franchise and capital stock thereon, contained in railway charters or other railway law of this State, shall *be by this Act, or any other law of this State providing for such* consolidation, transferred to or conferred upon such consolidated company, or the property and the franchises and capital stock therein, of such consolidation of railroads, or of the property appertaining thereto and used in the operation thereof; *and that the State shall have the power, by appropriate legislation, to prevent unjust descriminations against, and*

extortions for, freights and passage over all railroads in this State; and provided further, that no railroad company shall have power under this act of any of the laws of this State, to give or create any mortgage or other kind of lien on its railway property in this State, which shall be valid and binding against judgments and decrees and executions therefrom, for timbers furnished and work and labor done on, or for damages done to persons and property in the operation of its railroad in this State.

SEC. 4. Be it further enacted, that this Act take effect from and after its passage, the public welfare requiring it.

The Act of 1871 amended and extended by the Act under consideration, was an Act entitled "An Act granting certain powers to existing railroad corporations." This Act empowered any *existing* railroad corporation *of this State* to acquire by purchase or other contract, any other railroad. Second: the right to hold, use and operate any road theretofore purchased or acquired. Third: the right to consolidate with any other connecting or intersecting road. Fourth: it gave power to *any existing* railroad corporation to *issue bonds for any purpose within scope of its powers, or to* meet indebtedness already incurred, and *power to mortgage its property* and franchises to secure such bonds.

By a proviso the Act was declared not to operate so as to effect any lien in favor of the State or creditors of such corporations, and that such consolidation shall not be complete until approval of majority of stockholders. By the second section, the companies indebted to the State, on account of State aid, are excluded from the benefits of this Act until they should have paid off such indebtedness.

The Act of March 12, 1875, so amended this Act of 1871, as to extend it to all consolidations existing under *the joint* legislation of *this* and *another* State or States, and companies incorporated by another State where roads connect or intersect in this or another State.

Does this Act of 1877 contain more than one subject within the meaning of the constitutional enactment that no Act shall become a law which contains more than one subject? The leading case in this State construing this clause of our constitution is that of Cannon vs. Mathes, 8 Heisk., 504. The case arose upon the construction of an Act entitled "An Act to fix the *State tax on property*;" the fourth section of which increased the State tax on *privileges* fifty per cent. upon the existing basis.

Chief Justice Nicholson in delivering the opinion of the Court, quoted with approval the view of Judge Cooley as to the purpose of the clause in question, as follows: "That the general purpose is accomplished when a law has but one general object which is fairly indicated by its title." "To require every end and means necessary or convenient for the accomplishment of this general object, to be provided for by a separate Act relating to that alone, would not only be unreasonable, but would actually render legislation impossible."

He adds: "The generality of a title is no objection to it so long as it is not made to cover legislation incongruous in itself, and which by no fair intendment can be considered as having a necessary or proper connection." "The legislature must determine for itself how broad and comprehensive shall be the object of a statute, and how much particularity shall be employed in the title defining it.' The learned Chief Justice then concludes by saying: "We concur in these general views as sound and practical, and by them the validity of the Act in question must be tested."

The court held in the case then under consideration that an examination of the different sections of the Act indicated that the general subject of the Act was State revenue, and that a tax upon privileges was germane to the subject of a tax on property concerning the title of the Act. The Court after determining that the object of the constitutional provisions concerning the title of Acts was to prevent surprises of frauds upon the legislature, by means of provisions in bills of which the title gave no intimation, and which might, therefore, be overlooked, and carelessly or unintentionally adopted, laid down the rule for the construction of this clause as to the titles of bills to be; "*That any provision of the Act, directly or indirectly relating to the subject expressed in the title and having a natural connection therewith, and not foreign thereto* should be held embraced in it." This liberal rule of construction finds illustration in a number of cases by this Court. The case of Morrell vs. Fickle, 3 Lea. 79, is in point: An Act entitled "An Act to establish a Chancery and Law Court at Bristol, in the county of Sullivan," was held to embrace the establishment of seperate Chancery and Circuit Courts at Bristol, and that the establishment of two separate courts constituted but one subject—that subject being the establishment of such additional Courts for Sullivan county as were needed, and this subject was sufficiently indicated by the title. In State vs. McConnell, 3 Lea, 333, it was held that an Act entitled "An Act to create and establish the sixteenth judicial circuit in this State," which detached the County of Trousdale from the Seventh Circuit and attached it to the Fifth Circuit was valid. This conclusion Judge Cooper put upon the solid ground, that, "the establishment of a new circuit in a State already divided into judicial circuits, must necessarily require some change in the Circuits previously established, and such change may well be considered germane to the subject, and embraced in a caption embodying the general object." In the case of Luehrman vs. Taxing Dist. 2 Lea, 428, an Act entitled "An Act to repeal the charters of certain municipal corporations and to remand the territory and inhabitants thereof to the Government of the State" was held to embrace a provision turning the corporate property of such municipalities over to the State to remain public property for the uses to which

it had hitherto been applied. So in the same case, it was held that an Act entitled "An Act to establish taxing districts in this State, and provide the means of local government for the same," was valid, and embraced but one subject sufficiently indicated by the title, although the Act granted municipal franchises to the communities within the limits of the Taxing Districts, and gave to the corporations thus created all the legislative, judicial and police powers of an incorporated city, and contained specifications of offense against the District, with penalties and punishments.

The learned counsel have in argument pressed upon us the case of Ragio vs. State, 2 Pickle—seeming to find in it some principal of construction hostile to that laid down in Cannon vs. Mathes. That case does not contain any rule or principle for the construction of the constitutional clause in question in any way antagonistic to the well settled doctrine heretofore frequently announced by this Court. In the ascertainment of the general subject of an Act this Court must look to the provisions of the particular Act under consideration. If upon our knowledge of affairs, the Act seems to contain matters not germane, but incongruous we must.

In that case the title was exceedingly restrictive, and implied legislation, closing only barber shops on Sunday. Upon the facts as they appeared in that case, we thought that there was no necessary connection between barbering and keeping bath-rooms. Both might have been prohibited in an act under a title broad enough to comprehend both the two things. We therefore held, that the subject of the Act as indicated by the title was the prohibition of barbering on Sunday, and that the closing of bath-rooms was not germane to such a title, the two occupations not being necessarily so connected as to be embraced under the one head of barbering. The subjects of legislation are infinite. The determination as to whether the several provisions of an Act are congruous and germane become largely a question of fact.

Particular decisions cannot often be controlling in determination of subsequent cases arising out of this constitutional provision Cases will only serve as illustrations of the application of the liberal rule of construction adopted in Cannon vs. Mathes, and frequently approved in subsequent cases. The Ragio case, upon its facts, was rightly decided, and no rule of decision is laid down in that case; or is to be drawn from the decision which in any way conflicts with the earlier cases on the same subject.

Let us test the constitutionality of the Act of 1877 by the principles so clearly announced by Chief Justice Nicholson.

The object of the Act is to *regulate and define the terms upon which the State was willing to confer upon railroad corporations the power to consolidate*, and to define the powers of such consolidated companies. We have already seen that a

railway corporation, may not without express authority, abdicate its functions and duties, either by a sale, or lease, or mortgage. *A fortiori*, it may not lose its own identity by suffering consolidation with another. It would, therefore, seem to need no support of argument, that when the State by legislation undertook to confer upon all railroad corporations the power to absorb another, or to suffer an absorption by consolidation, it might well couple the grant of so extraordinary a power with the condition or proviso, that the corporations so empowered to consolidate should not have power, before or after such consolidation, to make any mortgage or create any lien which should effect the class of creditors to which complainants belong. This provision seems to be directly connected with the subject of consolidation, in that it is a condition upon which the power to consolidate and the unlimited power thereafter to execute mortgages, is granted. The subject of the Act is sufficiently indicated by its caption even under a more rigid construction of the constitutional clause on this matter than the well settled rule would require. If the title of this Act had been "An Act defining the terms and conditions upon which the power to consolidate is granted to all railroad corporations, and defining the powers of consolidated companies," it would be hardly more explicit than the title of this Act, which purports to be an Act amending the whole law on the subject of consolidations.

Now, if in the Act with the supposed title, the first section had provided, "That no railroad company shall have power to make any mortgage or create any lien which should be superior to judgments for timbers furnished or work and labor done, or injuries to persons or property;" and the second section, "that all such corporations should have power to consolidate, etc., we would then have an Act which, by the most rigid construction, would contain but one subject, and that subject distinctly indicated by the title. Yet any fair conconstruction of the Act as actually worded and its title as written, brings us to the same result.

The proviso is germane to the subject of consolidation and the title sufficient indication of this subject to prevent surprise or fraud, or the unintentional adoption of the Act in ignorance of this provision.

It is next insisted that this limitation upon the power to mortgage contained in the Act of 1877, is repealed by the Act of March 15, 1881. This latter Act confers the power to mortgage in very broad terms, and is extended to all railroad companies existing under the laws of this or another State, and to all companies which might thereafter be created. The Act contains no repealing provisions, and in no way refers to any former Act upon this subject. It does not therefore in terms undertake to repeal any former legislation. Repeals by implication are not favored. An Act will never be held to repeal by implication another Act, unless it

clearly appears that the two Acts cannot stand together. The repugnancy between the two Acts must be plain and unavoidable.

Hockaday vs. *Wilson*, 1 Head, 114.
Buchanan vs. *Robinson*, 3 Bax., 152.
Home Ins. Co. vs. *Taxing Dist.* 4 Lea, 644.

The Act of 1877 contains the proviso in favor of what may fairly be called the claims arising from operation of the railway. The Act of 1881 does not contain it. This proviso in favor of operating expenses and damages for personal injuries is not an uncommon or unusual one in this State. It first appears in our legislation in the Act of Feb. 19, 1873. This was an Act entitled "An Act to authorize certain railroad companies to issue consolidated or income bonds, and to mortgage their property to secure same for the purpose of paying off their indebtedness." By the third section power is given to any railroad company in the State owing outstanding floating debts, to issue bonds to be known as "Income Bonds" for an amount sufficient to pay off such indebtedness, and to secure same by a mortgage of its "rents and profits" and all of its other property. This is perhaps the first general legislation expressly authorizing a mortgage of the *income of* railroads, and this power is conferred upon the condition that "*no such mortgages shall bar any judgments against such roads for work, or labor, or damages to persons or property.* Acts 1873. p——.

Thus we see that it was the clear purpose of the legislature that the power to mortgage income should be coupled with the proviso that claims of the character presented by complainants should not be affected. Again by the Act of 1877, Ch. XII, p. 17, being an Act authorizing purchasers at a foreclosure sale of a railroad to organize themselves into a corporation and settling the power of such reorganized company, the same proviso is repeated and in such broad terms as to indicate the purpose of the legislature, shat this disability should apply *not only to companies so reorganized thereunder, but that no Act authorizing mortgages should be held as authorizing a mortgage or lien which should affect such claims.*

Claims of the class represented by complainants are for the most part exceedingly meritorious as against creditors by bond and mortgage, for the reason that such claims arise from the necessary operation of the road while in the hands of the mortgagor by agreement with the mortgagee. Possession with the right to operate and receive the income, it would seem, should involve the right and duty to apply such income primarily to operating expenses. Without this is done there can be no operation of the road by the debtor corporation, and no payments or interest to the mortgagee. Hence it would seem that a mortgage upon a going railroad to secure a debt to mature at a distant date, whereby the mort-

gagor is left in possession, would contemplate, even where the income is mortgaged, that the operating expenses, including damages, incidental to such operation, should be a first charge upon such income, and that only the income, after payment of all such charges, should pass or be applicable to payment of mortgage debt. In such case if income was applied to payment of mortgage debt or interest, and operating expenses were left unpaid, it would follow, that creditors of the latter class ought to be allowed to marshal the assets and receive satisfaction out of the corpus, to the extent that income had been diverted from payment of operating expenses. Clay vs. E. T.. & V. R. R. Co., 6 Heisk., 421; Fosdick vs. Schall, 99 U. S., 356; Burnham vs. Bowen, 111 U. S., 776; Golman vs. I. & M. Tel. Co., 91 U. S., 603; Galveston R. R. Co. vs. Cowdrey, 11 Wallace, 489; Parkhurst vs. R. R. Co., 19 Md., 147; Ellis vs. Boston R. R., 107 Mass., 1.

It is unnecessary, however, to decide that such claims would be entitled to priority of satisfaction out of income. The State of the pleadings do not perhaps raise this, and it is unnecessary in the view we have of the statute. We only allude to this equitable principle in connection with its repeated expression in our legislature prior to the Act of 1881, that we may in this light ascertain whether there is such repugnancy between the Act of 1881 and that of 1877, as to indicate a legislative intent that the former provisions should by the latter be abrogated. This intent we do not see, and the repugnancy is not obvious.

The two Acts may stand together, and in such case it is our duty to so decide.

The argument that the proviso in the Act of 1877, was intended to apply only to such consolidations as should thereafter occur is practically disposed of by the view we have already announced as to the true construction of that Act. If the view we have taken is correct as to the meaning of that Act, then it is a proviso effecting *all railroad companies alike whether they shall thereafter consolidate or not.*

It is unnecessary to determine whether the provisions of the Acts of Feb. 19, 1873, and that of March 16, 1877, limiting the power of railroad corporations with respect to their power of mortgaging property, do not as effectually operate to give superiority to the claims of creditors of the class protected by the subsequent Act of March 24, 1877. It is enough to decide as we do, that the proviso of the Act of March 24, 1877, is a valid and constitutional limitation upon the power of the E. T., V. & G. R. R. Company to mortgage its property in this State; and that complainants are entitled to the relief they seek against the property of that corporation in this State, now in the custody and control and ownership of the reorganized corporation.

In view of the well known fact that railroads are now for the most part built with bonds, and operated largely for the benefit of such creditors, the legislation whereby the debts

and liabilities created by the mortgagor in the course of this operation, as operating expenses, are secured as against such bonds is salutary in a high degree, and rests upon principles of unquestioned equity and right. The decree of the Chancellor will be affirmed, save as modified herein.

LURTON, J.

Filed October 28, 1889.

THOS. C. LATIMORE, Clerk.

STATE OF TENNESSEE, S. S.:

I, THOS. C. LATIMORE, Clerk of the Supreme Court of Tennessee, at Knoxville, do hereby certify that the foregoing is a full, true and perfect copy of the opinion of said Court in the case above entitled, delivered and filed therein on the day above set forth.

[SEAL.] WITNESS my hand and official seal at Knoxville, Tennessee, this 4th day of November, 1889.

THOS. C. LATIMORE, Clerk.

ORIGINAL BILL.

To the Hon. H. R. Gibson, Chancellor: &c.:

Holding the Chancery Court at Knoxville, for the Second Chancery District of Tennessee:

Joseph E. Frazier, a citizen of Knox County, Tennessee, complainant, brings his bill of complaint

vs.

The E. T., Va. & Ga. R. R. Company, a corporation under the laws of Tennessee, lately doing business in Knox County, Tenn, with principal office therein,

and the

E. T., Va. & Ga. Railway Company, a corporation under the laws of Tennessee, doing business and having its principal office in said County,

Defendants;

and respectfully shows to the Court:

I.

On the 9th day of January, 1883, while in the service of the E. T., Va. & Ga. Railroad Company, as an engineer, the complainant received severe personal injuries while engaged as an engineer in the service of said Company, in the opera-

tion of its road in this State, and had therefrom a right of action against said Company, for negligence in causing said injuries, and thereafter, to-wit, on the 9th day of Aug., 1883, he made an agreement, in writing, with said Company, compromising said right of action, upon consideration that said Company should pay all his medical bills on account of said injury, and should pay him $1,800 00, in cash, at date of contract, $3,600.00 thereafter, at the rate of $90.00 per month, until the same should be fully paid. It was further agreed that complainant should, upon demand by said Company, render to it such services, in its shops, as he was physically able to perform.

A copy of said contract, in writing, is herewith filed, marked "Exhibit A," and prayed to be taken as a part of this Bill, the original of which is now on file as part of the record in Circuit Court of this County, will be produced and filed before hearing.

Said Company paid to complainant $1,800.00, cash in hand, and also paid him $90.00 per month from the 9th of September, 1884, to the 9th of January, 1885, since which date it has failed and refused to make him any further payments upon the agreement aforesaid. No services were demanded of complainant by said Company. The final monthly payment was due complainant under said agreement on the 9th of January last, and there is now due him 36 monthly installments of $90.00 each, and $9.00 for three extra days, extending from January 6th, 1885, to January 9th, 1888, together with accruing interest upon each payment from the date of its maturity.

II.

On the 27th of January, 1885, complainant brought an action at law in the Circuit Court of this County against said Company, for the full balance promised in said compromise agreement, upon trial of which it was adjudged and determined that said action had been prematurely brought, and the same was accordingly dismissed. This judgment on appeal by complainant was affirmed by the Supreme Court at its September Term, 1887, but no judgment was rendered in said action upon the merits of the present claim.

III.

On the 10th day of June, 1881, said Railroad Company conveyed all its property, rights and franchises then owned, or thereafter to be acquired, to the Central Trust Company of New York, by Deed of Trust, to secure certain bonds to be issued by it, amounting to $22,000,000.00. On the 6th day of January, 1885, default having been made in the payment of interest on said bonds a bill was filed in the Circuit Court of the United States for the Eastern District of Tennessee, by said Trustee, to foreclose said Deed of Trust, and

on the same day all of the property of said Railroad Company was placed in possession of a Receiver. Said property remained in possession of said Receiver till 30th day of June, 1886, when the same, including its real estate, chattels, choses in action, franchises, &c., were sold, under decree of foreclosure, to a Committee of said Bondholders, who shortly thereafter transferred the same to defendant, the E. T., V. & G. Railway Company, which is the successor, in right, interest and operation of the Railroad Company of the same name, and continues to hold said property and operate said Railroad. Said Railroad Company has thus parted with all its property rights, franchises, &c., and is wholly insolvent at law. It has kept no offices and transacted no business in its name since the sale aforesaid, and is practically defunct.

IV.

Said E. T., Va. & Ga. Railroad Company was a corporation chartered under the laws of Tennessee, and doing business therein for many years previous to and until the date of the sale aforesaid. It had owned the line of railroad in the State of Tennessee, extending from Bristol through Knoxville to Chattanooga, with a full equipment therefor. It also owned considerable real estate in this county. Its general officers were in Knoxville, and at the date of its collapse two of its directors resided in Knox County, to-wit, Charles M. McGhee and E. J. Sanford. The principal officers of the Company resided at New York. The railway property of the Company in this State amounted to several millions of dollars. Besides its bonded indebtedness aforesaid, it owed considerable sums on contract to various persons, and was liable to various other persons besides complainant, in sums amounting to many thousands of dollars, on account of damages done to persons and property in the operation of its railroad in this State, judgments for which has been rendered against it in various Courts of the State, which still remain unsatisfied.

V.

Complainant further shows that his only means of satisfaction of his claim aforesaid against said Company is out of the Railway property formerly owned by it and conveyed by the Deed of Trust aforesaid, and now owned and held by the said E. T., Va. & Ga. Railway Company, which property by the Act of March 24th, 1877, under which said mortgage was executed, was made liable to the debt of complainant and others having claims for damages to persons and property as aforesaid in preference to the debts secured by the mortgage aforesaid.

VI.

And so it is, may it please your Honor, said Railway Company holding under and by virtue of a purchase at a

sale for the satisfaction of claims inferior to those of complainant, is enjoying the possession and profits of the only property of said Railroad Company out of which complainant may have satisfaction of his said debt, and complainant is advised that for this wrong he may have redress in a Court of Equity by whose orders and decrees said property will be subjected to sale if necessary to satisfy his demand.

PRAYER.

The premises considered, the prayer of complainant is (1) that said E. T., Va. & Ga. Railroad Company, and the E. T., Va. & Ga. Railway Company, be made parties defendant to this bill, and by proper process to be duly served as to said Railway Company upon the proper officer, and as to said Railroad Company upon said Sanford and McGhee, as its last directors, be required to answer this bill according to the course and practice of this Court.

2.

That complainant have judgment against said Railroad Company for the amount of his debt aforesaid, and that the same be satisfied by appropriate decree out of the Railway property of said Company aforesaid, now owned by said Railway Company.

3.

That this bill be filed not only for complainant, but also on behalf of all other creditors of said Railroad Company who may choose to make themselves parties hereto, according to the practice of this Court, and especially those having claims like him, for injuries to persons or property.

4.

And since said Sanford and McGhee, directors as aforesaid in said Railroad Company, and the other directors and officers thereof, so far as complainant has information, are also interested as shareholders, directors or officers of said Railway Company, complainant prays that some disinterested and impartial person be appointed by this Court, receiver of the assets of said Railroad Company, with authority to bring and prosecute all suits and do all other things necessary for the satisfaction of the claims of the creditors of said moribund corporation.

5.

That under the orders of this Court said assets be marshalled, if necessary, and appropriated to the payment of various creditors' claims, as in equity they may be entitled, and especially his own claim aforesaid.

6.

And if complainant has in any way mistaken his remedy,

he prays for all such other and further process and relief, as in equity and good conscience he may be entitled to, and for general relief.

INGERSOLL & PEYTON,
Solicitors for Complainant.

STATE OF TENNESSEE, }
KNOX COUNTY. } ss.

This day personally appeared before me, the undersigned authority, Joseph E. Frazier, complainant in the foregoing bill, and made oath in due form of law, that the statements contained in the foregoing bill are true to the best of his knowledge and belief.

JOSEPH E. FRAZIER.

Sworn to and subscribed before me, this 13th October, 1888.

JNO. W. GREENE,
(SEAL.) Notary Public.

ANSWER AND DEMURRER OF E. T., V. & G. RY. COMPANY, FILED DEC. 3RD, 1888.

W. L. Trent, C. & M., by W. A. Galbraith, D. C. & M. Answer and Demurrer of the East Tennessee, Virginia & Georgia Railway Company to the Bill of Complaint filed against it and another, in the Chancery Court at Knoxville, Tennessee.

This respondent, for answer and demurrer to said bill, says it knows nothing concerning complainant's cause of action against the East Tennessee, Virginia & Georgia Railroad Company, except from the statements in the bill; and therefore it cannot admit any of the allegations of the bill upon this point, and it calls upon complainant to sustain them by plenary proof. In the last event, however, this respondent will show that complainant has ever since the making of said contract sued on been engaged at work, and in business, and has made, or by due diligence might have made, $90.00 per month for his services; and respondent will insist that such amounts must be deducted from any amounts which may be proven due upon said contract.

Respondent, further answering, admits that said Railroad Company in June, 1881, conveyed all of its property, rights and franchises to the Central Trust Company; that the same were sold under foreclosure proceedings in the Circuit Court of the United States, at Knoxville, as stated in the bill; that all of the realty and personalty of said East Tennessee, Virginia & Georgia Railroad Company were regularly purchased at said judicial sale, legally made, by Messrs. McGhee and other gentlemen associated with him, and a full and fair price was paid by them therefor, and the

sale was duly confirmed by said United States Court; that said purchasers afterwards sold transferred and conveyed said property and every part thereof to this respondent, for the full and fair price of Ten Million of dollars, long since truly paid, and said property was transferred and conveyed to this respondent free from any lien or claim of complainant against it.

Respondent admits that it is now the owner of all said property; but respondent is a corporation entirely distinct and different from the East Tennessee, Virginia & Georgia Railroad Company, and neither it nor its property is in any way liable or responsible for the debts, contracts or liabilities of said Railroad Company.

Respondent further answering denies, that, by the Act of March 24, 1877, it, or any of the property conveyed to it as aforesaid, is liable for complainant's debt or claim, and denies that complainant's claim is or ever was any lien upon said property or any part of it, and that complainant has any right of satisfaction upon said property.

And respondent avers and shows that the said C. M. McGhee and his associates were in the full possession of all of said property, claiming the same in fee simple under and by virtue of their purchase of the same at said judicial sale mentioned in the bill, and while they were so holding, this respondent purchased said property from them, and paid them a full and fair price, to-wit, the sum of Ten Millions of dollars for the same, and took and received their deed in fee simple therefor, and the said deed was duly registered, without respondent having any knowledge or notice of complainant's alleged lien and equity againt said property, and respondent pleads and relies upon the fact that it is an innocent purchaser of said property.

And as respondent is advised that complainant's bill upon its face fails to make out any legal case against respondent, it comes and demurs to said bill, and for cause of demurrer shows the following:

1. The demand of the complainant set out in the bill, and shown in the exhibit thereto, is simply for damages for breach of contract, and is not covered or protected by the statute referred to in the bill.

2. Said demand is not for timber sold, nor on account of work and labor, nor for personal injuries; and the bill shows that the demurrant takes the property referred to in the bill free from complainants demand.

3. The provision in the statute of 1877, relied upon by complainant for relief against the railroad property in demurrant's hands was not enacted in accordance with the constitution of Tennessee, and is therefore null and void.

4. Complainant's right to relief, if any he has, is against the purchase money paid into the United States Circuit

Court at Knoxville for said property, and not against the property in demurrant's hands.

THE EAST TENNESSEE, VIRGINIA AND GEORGIA RAILWAY COMPANY,

By LEON JOUROLMON.

HENDERSON & JOUROLMON, Solicitors for Resp't.

IN THE CHANCERY COURT AT KNOXVILLE, TENNESSEE. JOS. E. FRAZIER, VS. EAST TENNESSEE, VIRGINIA & GEORGIA R. R. CO. ET. AL.	Petition of W. J. McSween and others, Judgment Creditors filed by order of Court June 17, 1889. W. L. Trent, C. & M. by W. A. Galbraith, D. C. & M.

To the Hon. Henry R. Gibson, Chancellor of Tennessee, holding said Chancery Court:

Your petitioners, W. J. McSween, resident of Cocke County, Jos. R. Simpson, administrator of Daniel Cash, deceased, J. J. Hunt, Nathan Shipley, James Brobeck, Daniel C. Conner and wife, Dulcina D. Conner, A. F. Brown, residents of Washington County, John C. Black, O. C. King, executor of L. M. King, deceased, and Ella Elliott, administratrix of Thomas Elliott, deceased, residents of Hamblen County, Mary Edwards, administratrix of Calvin Howell, deceased, G. W. Austin and W. S. Hughes, residents of Bradley County, E. A. Wright, administratrix of Wiley Wright, deceased, of Knox County, James Nelson, administrator of Geo. Nelson, deceased, of Loudon County, C. D. McKemy, resident of Greene County, and Wm. Burrow, a resident of Hamilton County, respectfully show to this Court that they severally obtained judgments against the defendant, the East Tennessee, Virginia and Georgia Railroad Company, for work and labor done on and for damages done to persons and property in the operation of its railroad in this State, as follows:

W. J. McSween, 10 Oct., 1885, Supreme Court	$ 100.00
Jos. R. Simpson, administrator, 29 Sept., 1885, Supreme Court	1,500.00
J. J. Hunt, 3 Oct, 1885 and 25	26.65
Nathan Shipley, 28 Aug., 1886, Washington Circuit Court	975.00
James Brobeck, 10 Oct., 1885	150.00
D. C. Conner and wife, 3 Oct., 1885, Supreme Court	500.00

A. F. Brown, 17 April, 1885, Washington County Circuit Court	300.00
John C. Black, 11 Nov., 1886, Supreme Court	3,000.00
O. C. King, executor, Oct., 1886, Supreme Court	68.31
Ella Elliott, administratrix, 21 Dec., 1885, Jefferson Circuit Court	1,000.00
Mary Edwards, administratrix, 3 May, 1886, Bradley Circuit Court	4,500.00
W. S. Hughes, 3 May, 1886, Bradley Circuit Court	3,000.00
E. A. Wright, administratrix, 5 Feb., 1886, Knox Circuit Court	5,000.00
C. D. McKemy, 28 Oct., 1887, Supreme Court	5,000.00
Jas. Nelson, administrator, 6 Oct., 1886, Supreme Court	2,500.00
W. M. Burrow, 21 Sept. 1885, Hamilton Circuit Court	58.75
G. H. Austin, 14 May, 1885, Bradley Circuit Court	650.00

And petitioners show that with said amounts so recovered they also recovered costs of the cases severally against said company; and that they have had executions for their said recoveries and nothing can be made thereon.

Petitioners pray that they may be made parties co-complainant with Jos. E. Frazier, and permitted to prove their claims as judgment creditors aforesaid, which they will do when required by producing certified copies of their said judgments if demanded.

And petitioners will enter into any and all such bonds and otherwise comply with such terms as may be required of them for the prosecution of their said claims. And as in duty bound petitioners will ever pray, etc.

W. J. McSween,
Jos. R. Simpson,
J. J. Hunt,
Nathan Shipley,
Jas. Brobeck,
D. C. Conner,
Dulcina Conner,
A. F. Brown,
Jno. C. Black,
O. C. King,
Ella Elliott,
Mary Edwards,
W. S. Hughes,
E. A. Wright,
C. D. McKemy,
James Nelson,
W. M. Burrow,
G. H. Austin.

By H. H. Ingersoll, Solicitor.

STATE OF TENNESSEE, COUNTY OF KNOX.

H. H. Ingersoll, solicitor for petitioners, makes oath that the foregoing petition is true to the best of his knowledge, information and belief.

H. H. INGERSOLL.

Sworn to and subscribed before me, 17th June, 1889.

W. L. TRENT, C. & M.

MONDAY, JUNE 17, 1889.

Court met pursuant to adjournment, present and presiding Hon. Henry R. Gibson, Chancellor. The record of Saturday last, June 15th, was read, approved and signed, and the following additional proceedings were had, to-wit:

ALLOWING CREDITORS TO BECOME PARTIES-COMPLAINANT.

JOS. E. FRAZIER
vs.
E. T., VA. & GA. R. R. CO.
et al.

No. 4380—Order.

ON INTERVENING PETITION.

In this cause was this day presented the Petition of certain jugdment creditors of the E. Tenn., Va. & Ga. R. R. Co. to wit: W. J. McSween, Jos. R. Simpson, J. J. Hunt, Nathan Shipley, James Brobeck, D. C. Conner and wife Dulcina, A. F. Brown, Jno. C. Black, O. C. King, Ex'r., Ella Elliott, Admx., Mary Edwards, Admx., W. S. Hughes, E. A. Wright, Admx., C. D. McKemy, Jas. Nelson, W. M. Burrow, and G. H. Austin, praying to be made parties co-complainant with the original complainant, which the Chancellor ordered to be filed, and also that said petitioners on signing the original costs-bond, be admitted as co-complainants. And said bond being so signed by complainants under said order, said petitioners are hereby declared co-complainants with said Frazier, and as such have leave to unite in the bill and prosecute their claims herein.

MONDAY, JUNE 24, 1889.

Court met pursuant to adjournment, present and presiding Hon. Henry R Gibson, Chancellor. Record of Saturday last, June 22nd, inst., read, approved and signed, and the following proceedings were had, to-wit:

DECREE AND ORDER OF REFERENCE TO C. & M.

JOSEPH E. FRAZIER
vs.
E. TENN., VA. & GA. R. R. CO.
et al.

No. 4380—Decree.

This cause came on to be heard on the pleadings and proof, the pro confesso heretofore entered against the East Tenn., Va. & Ga. R. R. Co., and the petition of W. J. McSween and others, judgment creditors of the defendant Railroad Company and order thereon, and was argued by counsel; and thereupon, upon consideration of the same, it was ordered, adjudged and decreed, as follows:

I.

That the contract and article of compromise between complainant, Joseph E. Frazier, and the defendant, the East Tenn., Va. & Ga. R. R. Co., filed as "Exhibit A" to the Bill, was intended by the parties thereto, and is to be taken and considered in legal effect.

1. As a stipulation and agreement ascertaining and liquidating the amount of damages for which said Company was liable and which it should and would pay to complainant Frazier on account of personal injuries received by him on the 9th of January, 1883, from said Railroad Company in the operation of its Railroad in the State of Tennessee, and not as a discharge and satisfaction of his demand for such damages against said Company.

2. And also as a contract of employment for the rendition of such personal services as said Frazier might be physically able to perform for said Railroad Company, when called upon therefor by the officers and agents of said Company.

II.

That said defendant Railroad Company on the 6th day of January, 1885, became insolvent and thenceforth failed and refused to perform its contract with complainant Frazier, and on account thereof became liable to complainant for the residue of said liquidated damages remaining unpaid on said 6th day of January, 1885, and payable in monthly installments of Ninety Dollars each, to-wit: Nine Dollars on the 6th day of January, 1885, and Ninety Dollars on the 9th day of each succeeding month, till and including the

1. The amount due Complainant Frazier, under this decree, principal and interest.

2. The amount to be deducted therefrom under the provisions of this decree, making monthly credits as proof may warrant.

3. The unsatisfied judgment or decree due from said Railroad Company to each of the judgment creditors aforesaid, and what is the basis of each of such judgments or decrees, whether within the provisions of clause IX of this Decree.

And this cause is retained for further orders and decrees, on the coming in of said report.

ANSWER TO PETITIONS—FILED JULY 1, 1889.

W. L. Trent, C. & M., by W. A. Galbraith, D. C. & M.

The Answer of the East Tennessee, Virginia & Georgia Railway Company to the Intervening Petitions filed against it by G. W. Robertson and wife, and W. J. McSween, and others, except that of C. D. McKemy, in the case of Joseph E. Frazier against it and another, in the Chancery Court of Knoxville, Tennessee.

This respondent, for answer to said petitions, says:

1. It knows nothing concerning the claims and judgments set out in said petitions, nor upon what they are based; and, therefore, it cannot admit the same, or any of them, but calls on petitioners to establish the same by proper proof.

2. Respondent, upon information and belief, avers that if petitioners, or any of them, ever had any such claims against the East Tenn., Va. & Ga. Railroad Company, the same have each and all been well and truly paid and satisfied.

3. Respondent is advised and will insist that the Act of 1877, under which petitioners seek to pursue and appropriate respondent's property to the payment of their claims, and especially the provision of the 3rd Section of said Act, is unconstitutional and void, because said Act embraces more than one subject, and the proviso in Section 3 aforesaid and the subject of said proviso is not expressed in the title of said Act, and because said Act is not in compliance with Article 2, Section 17, of the Constitution of this State. And therefore petitioners have no warrant of law for asking satisfaction of their claims from the property mentioned in the original bill.

4. Respondent is advised and will insist that if petitioners ever had any lien upon said property or right to satisfaction from it, such right and lien was merged in any judgments obtained by them, and in the statutory judgment-lien provided in this State, and that petitioners having failed for

more than a year to pursue the judgment-lien, they have abandoned and lost any lien they may have otherwise had upon the aforesaid property.

5. Respondent refers to, repeats and continues to rely on its plea of innocent purchaser, set out in its answer in this cause.

6. Respondent avers and shows that on the .....day of ...., the petitioner, W. M. Burrow, presented and filed his petition in the case of the Central Trust Co. of New York vs. East Tennessee, Virginia & Georgia Railroad Company, then pending in the Circuit Court of the United States for the Northern Division of the Eastern District of Tennessee, setting out the same judgment set out in the petition in this cause, and asking that it be satisfied from the same property sought to be reached in the present case, to-wit, the property formerly owned by the East Tennessee, Virginia & Georgia Railroad Company and now owned by this respondent, and from the proceeds of said property in said cause; that said mortgagee, the Central Trust Company of New York and this respondent, were duly before the court in that cause, and said court had jurisdiction of all the parties and the subject-matter; that upon motion and demurrer of said respondent, and said Trust Company, said court legally adjudged and decreed that petitioner had no legal right to relief nor to satisfaction of said judgment from said property. And said judgment remains in full force and respondent pleads and relies on the same as res adjudicata and an estoppel on petitioner to again have said matter litigated.

7. And respondent relies on all defenses set up in the answer in this case, and upon all legal defenses to said claims set up by said various petitioners.

E. T., Va. & Ga. Ry. Co.

Henderson & Jourolmon, Solicitors.

Answer of E. T., Va. & Ga. Ry. Co. to Petition of C. D. McKemy, Filed July 1, 1889.

W. L. Trent, C. & M., by W. A. Galbraith, D. C. & M.

The answer of the East Tennessee, Virginia & Georgia Railway Co. to the intervening petition of C. D. McKemy, filed against said Company in the cause of Joseph E. Frazier against said Company, in the Chancery Court for Knox County, Tennessee, said McKemy having united in said petition with G. W. Robertson and others.

And for answer to said petition, so far as it is the petition of said C. D. McKemy, this respondent says:

1. Respondent has no knowledge concerning the claim and judgment in favor of said McKemy, set forth in said

petition, nor upon what ground or cause of action the same was based, if any; and it demands full proof of all the said matters.

2. Respondent is advised and charges that the Act of 1877 (Chap. 72) of the Legislature of Tennessee referred to in said petition, and under which said petitioner claims the right to pursue and appropriate the property of respondent mentioned in said petition, and especially the proviso in Sec. 3 of said Act is unconstitutional, null and void, for the reason that said Act embraces more than one subject; that none of the subjects so embraced are expressed in the title to said Act, and that the subject embraced and covered by said proviso to said Sec. 3, is not expressed in said title, and that said Act is inconsistent with and in violation of Sec. 17, Article 2, of the Constitution of Tennessee.

3. Respondent avers that it is an innocent purchaser of said property, for full and valuable consideration actually paid before any claim or right of action accrued in favor of said McKemy, as set forth in its answer to the original bill in this cause; and, therefore, of the unconstitutionality of said Act, petitioner has no right or warrant of law for seeking satisfaction of any judgment in his favor out of said property.

4. Respondent is advised and charges that if said McKemy ever had any lien upon said property or any right to the satisfaction of his claim out of said property, and afterwards obtained judgment upon such claim, as alleged in said petition, then such right and lien were merged in said judgment and in the statutory lien of such judgment under the laws of the State of Tennessee; and that petitioner having failed for more than a year after said judgment to pursue or enforce the lien thereof against said property, he has abandoned and lost any lien or right he may have ever had against said property under said Act above mentioned.

5. Respondent here repeats and relies upon all the allegations and defenses contained and set up in its said answer to the original bill in this cause, and on its plea of innocent purchaser set up in said answer. And respondent is advised and charges that as its title to said property was obtained under the forclosure of the deed of trust mentioned in said original bill, which deed of trust was made long before any right of action is alleged to have occurred in favor of said McKemy, the right and title of respondent is superior to any right of lien in said McKemy.

Respondent prays therefore that said petition may be dismissed and all relief thereunder dismissed.

ANDREWS & THORNBURGH,
Sol'rs for Def't, the E. T., Va. & Ga. Ry. Co.

AUGUST 8, 1889.

Court met pursuant to adjournment, present and presid-

ing the Hon. Henry R. Gibson, Chancellor. Record of yesterday read, approved and signed; and the following proceedings were had to-wit:

ORDER CORRECTING BILL.

JOSEPH E. FRAZIER, *vs.* E. T., Va. & Ga., R. R. Co. *et. al.*	No. 4,380—Order.

In this cause on motion of complainant, and it appearing that there is a clerical error in the draft of complainant's bill, in the matter of dates, it is ordered by the Chancellor that complainant have leave to correct the same by inserting in the second page in lieu of "Aug., 1883," "September, 1884," and "9 Jan.," in lieu of "6" of Jan. 1885; so that, the same shall read $90.00 per month from the 9th Sep. 1884 to the 9th Jan., 1885, as the period of payment to complainant Frazier by defendant R. R. Co., at $90.00 per month in addition to the $180 00 originally paid.

DECREE—Aug. 6th, 1889.

TUESDAY, AUG. 6, 1889.

Court met pursuant to adjournment, present and presiding the Hon. Henry R. Gibson, Chancellor. The Record of yesterday was read, approved and signed, and the following additional proceedings were had, to-wit:

JOSEPH R. FRAZIER, *vs.* E. T., Va. & Ga. R. R. Co. *et. al.*	No. 4,380—Decree.

This case came on for further hearing before the Chancellor upon the Master's Report and exceptions thereto, and was argued by Counsel and on consideration it was ordered, adjudged and decreed as follows:

1.

That the complainant's exception and the defendant's first exception to said Report be overruled, and the amount of monthly deduction from the wages promised complainant

by reason of his ability to have made earnings at other employment be fixed at Thirty-Five Dollars ($35.) from and after the 9th of January, 1885, the date of complainant's discharge by the Receiver 'till the 9th of January, 1888, the date fixed for the expiration of complainants term of employment by defendant Railroad Company which amounts correcting computation of Clerk to One Thousand Four Hundred and Ninety-One Dollars ($1,491.)

2.

And as to the third exception of defendant, it is by consent decreed that in addition to the Eighteen Hundred Dollars ($1,800) paid to complainant at date of compromise, he received from defendant, East Tennessee, Virginia & Georgia Railroad Company monthly payments at Ninety Dollars ($90) per month from the 9th of September, 1884, to the 9th of January, 1885, in all Three Hundred and Sixty Dollars, ($360.)

And it is further decreed that the balance due him under said compromise, without deduction, August 1, 1889, amounts principal and interest, to Three Thousand Eight Hundred and Thirty-Four Dollars, ($3,834) and deducting the amount of said monthly earnings, One Thousand Four Hundred and Ninety-One Dollars ($1.491) therefrom the Chancellor decrees the rest and residue of the sum due complainant, Frazier, from said defendant to be August 1, 1889, Two Thousand Three Hundred and Forty-Three Dollars, ($2,343) which sum is hereby adjudged in favor of Joseph E. Frazier against the East Tennessee, Virginia & Georgia Railroad Company, in satisfaction of his demand under Ex. A. to Bill.

3.

The second exception of defendant to said Report is allowed, and it is accordingly decreed that the claim of J. J. Hunt being a judgment for damages for the wrongful detention of property by the defendant East Tennessee, Virginia & Georgia Railroad Company, recovered in a replevin suit by said Hunt against defendant, is not for damages to property, and therefore is not prior in right to the mortgage under which the defendant, the East Tennessee, Virginia & Georgia Railroad Company claims the property of the Old Railroad Company.

4.

It is further decreed that as to the remaining judgment, claims in favor of other petitioning creditors than said Hunt, the Master's Report be confirmed, and that the following amounts are due respectively to the following persons having judgments against said East Tennessee, Virginia & Georgia Railroad Company, for damages done to persons or property, in the operation of its railroad in this State, to-wit:

W. J. McSween, One Hundred and Twenty-Two and 25-100 Dollars	$ 122.25
Jas. R. Simpson, administrator of Daniel Cash, deceased,, Eighteen Hundred and Forty-Five Dollars	1,845.00
Costs, Seventy-Seven and 04-100	77.04
Total Nineteen Hundred and Twenty-Two and 04-100 Dollars	$ 1,922.04
Nathan Shipley, Twelve Hundred and Seventeen and 87-100 Dollars	1,217.87
Costs	127.10
Total, Thirteen Hundred and Forty-Four Dollar and 97-100 Dollars	$ 1,344.97
James Brobeck, One Hundred and Eighty-Four and 27-100	$ 184.27
Costs	37.95
Total, Two Hundred and Twenty-Two and 22-100 Dollars	$ 222.22
D. C. Conner and wife Dulcina, Six Hundred and Fourteen and 75-100 Dollars	$ 614.75
Costs	15.70
Total, Six Hundred and Thirty and 45-100 Dollars	$ 630.45
A. F. Brown, Three Hundred and Seventy-Seven and 10-100 Dollars	377.10
Jno. C. Black, Three Thousand Four Hundred and Ninety Dollars	3,490.00
Costs	190.60
Total, Three Thousand Six Hundred and Eighty Dollars and 60-100.	$ 3,680.60
O. C. King, executor, Seventy-Two and 71-100 Dollars.	72.71
Costs	277.40
Total, Three Hundred and Fifty and 11-100 Dollars	$ 350.11
Ella Elliott, administratrix of Thos. Elliott, deceased, Twelve Hundred and Sixteen and 55-100 Dollars.	1,216.55
Mary Edwards, administratrix of Calvin Howell, deceased, Five Thousand and Three Hundred and Seventy-Six Dollars	5,376.00
W. S. Hughes, Three Thousand Five Hundred and Eighty-Four Dollars	$ 3,584.00
E. A. Wright, administratrix, of Wiley Wright, deceased, Six Thousand and Forty-Six Dollars and 65-100 Dollars	$ 6,046.65
C. D. McKemy, Five Thousand Five Hundred and Twenty-Seven and 50-100 Dollars	5,527.50
Costs	228.95
Total, Five Thousand Seven Hundred and Fifty-Six and 45-00 Dollars	$ 5,756.45

James Nelson, administrator of Geo. Nelson, deceased, Two Thousand Nine Hundred and Seventy-Two Dollars and 50-100 Dollars		2,972.50
Costs		100.80
Total, Three Thousand and Twenty-Three and 30-100 Dollars	$	3,023.30
W. M. Burrow, Seventy-Two and 30-100 Dollars		72.30
G. H. Austin, Eight Hundred and Fourteen Dollars		814.00
Geo. W. Robertson and wife, Hattie J., (formerly) Perry) Two Thousand and Eight Hundred and Forty-Five and 60-100 Dollars		2,845.60
Costs		47.46
Total Two Thousand Eight Hundred and Ninety-Three and 06-100 Dollars	$	2,893.06
Nancy Aultom, One Thousand and Eighty-Eight and 33-100 Dollars		1,088.33
Costs		166.35
Total Twelve Hundred and Four and 68-100 Dollars	$	1,204.68
A. F. Ward & Son, Five Hundred and Fifty-Five and 14-100 Dollars		555.14
Costs		28.40
Total, Five Hundred and Eighty-Three and 54-100 Dollars	$	583.54
Elbert Redwine, administrator Mary DeFreese, deceased, Seventy-One and 68-100 Dollars		71.68
Costs		17.05
Total, Eighty-Eight and 73-100 Dollars	$	88.73

And it is further decreed that the mortgage executed by said Railroad Company, under foreclosure of which the defendant Railway Company holds the franchises and property formerly owned by said Railroad Company is not valid and binding against the aforesaid judgments, and that said parties-complainant, as judgment creditors of said Railroad Company, have the right to satisfaction of their said judgments out of said franchises and property.

5.

And it appearing that at the time of the injuries severally done by said Railroad Company, for which said judgments were rendered and said compromise agreement was executed, said Company owned and operated the line of Railroad in this State, extending from Bristol, two hundred and forty-two miles, to Chattanooga, known as the East Tenne-see, Virginia & Georgia Railroad, together with a full equipment of locomotives and cars therefor, and considerable real estate and other property in Knox County, and also the franchise to own, hold, manage and operate said property as a Railroad corporation and receive pay, fares, tolls and tariffs therefor, all of which are now held and claimed by

the defendant Railway Company under a right inferior to that of complainants' as judgment creditors aforesaid of said Railroad Company; therefore, it is decreed that unless the sum of the aforesaid decree and judgments, including costs of same, and also the costs of this suit, which are hereby adjudged against the defendants, shall, within sixty days from this date, be fully paid and satisfied, W. L. Trent, Clerk & Master of this Court, and hereby specially appointed Commissioner for that purpose, shall, after advertising as required by law, in the Knoxville Journal, Philadelphia Times and New York Tribune, proceed to sell at public outcry, at the Court-house door in Knoxville, to the highest bidder for cash in hand, all the Railroad property and franchises aforesaid, or so much as may be necessary to satisfy said decree, judgments and costs.

Said sale will be made subject to all valid liens and mortgages of said property and franchises, or any part or portion thereof, made prior to March 24th, 1887, and only such property and equipments will be sold as were owned and held by said Railroad Company, or the Receiver thereof, on the 30th of June, 1886, when sale of said property and franchises was made to the defendant Railway Company.

In making sale the Master will offer first the personal property owned and held by said Railroad Company at said date, but now held by said Railway Company, and if this shall realize a sufficient sum to satisfy the liabilities of said Railroad Company, under this decree, then the sale shall cease. But if, from the sale of personal property, a sufficient sum shall not be realized for such satisfaction, then the Master shall offer and sell the road-bed and franchises atoresaid, as a whole and in entirety, unless the said Railway Company shall in writing designate specific realty in parcel sufficient to satisfy the balance due under this decree, in which event said specifically designated parcel or parcels shall be sold.

And if said judgment creditors, or any of them, shall become purchasers of said property, or any part thereof, at said sale, the Master may accept in lieu of cash from such purchaser or purchasers his, or her, or their receipt or receipts for said bid or bids, to the amount due him, her or them jointly or severally under this decree.

All personal property so sold by the Master will be delivered forthwith to the purchaser or purchasers, who shall be entitled to immediate possession; and to the end that the same may be surrendered by said Railway Company on demand of the Master and delivered instantly, and without delay, to purchasers, a Writ of Assistance will issue to the Sheriff of Knox County, or any other County by Counterpart Writ, if necessary commanding him to take any property so sold and make due delivery of the same to the purchaser. And the Master will report to the next term of the court.

6.

Upon the aggregate recovery herein decreed a lien is

hereby declared in favor of Ingersoll & Peyton, for services rendered as counsel, in this suit in behalf of creditors gererally.

7.

And out of the fund resulting from this decree, whether realized by payment or produced by sale, the Master will pay.

1.

1. The costs of this cause.
2. The fees of counsel for complainants in this cause.
3. The claims of complainants in full if the fund is sufficient; if not *pro rata* among them on the basis of equality.

And the cause is reserved for further adjudication on the coming in of the Master's report.

And the defendant, East Tennessee, Virginia & Georgia Railway Company, being dissatisfied with said decree, prays an appeal therefrom and from all the decrees and orders in this cause, to the next term of the Supreme Court of Tennessee, to be held at Knoxville, which appeal is granted upon said defendant's giving bond with security for costs and damages for said appeal.

Filed August 6th, 1889.

W. L. TRENT, C. & M.
By W. A. GALBRAITH, D. C. & M.

ASSIGNMENT OF ERRORS.

JOSEPH E. FRAZIER	In the Supreme Court of
vs.	Tennessee, at Knoxville, by
E. T., V. & G. R. R. Co.,	appeal from the Chancery
et al.	Court of Knox County.

Comes the appellant, the East Tennessee, Virginia & Georgia Railway Company, and shows and assigns the following reversible errors appearing in the record proceedings and decrees in this cause as grounds for reversal of said decrees.

The pleadings and facts are as follows:

PLEADINGS.

The bill was filed October 15th, 1888, by Frazier against the East Tennessee, Virginia & Georgia Railroad Company and appellant alleging:

1. That Jan. 9, 1883, while in the service of the Railroad Company he was injured, and on 9th of August, 1883, he compromised his rights of action therefor with said Company, it paying $1,800.00 in cash, and promising to pay $3,600.00 more, in installments of $90 00 per month until paid, and he was to perform therefor such services in said

Company's shops as he was physically able to perform; that he was paid $90.00 per month until January 9th, 1885, when the road went into the hands of a Receiver, and he was discharged.

2. That he brought suit on said contract against said Company in January, 1885, which was finally tried in this court and dismissed as premature.

3. That on June 15th, 1881, said Railroad Company conveyed all its property, rights and franchises then owned or thereafter to be acquired to the Central Trust Company of New York, by deed of trust to secure $22,000,000.00 of bonds; that on January 6th, 1885, bill was filed by said trustee to foreclose said deed in the United States Circuit Court at Knoxville, under which all of said property, &c., were sold and became the property of appellant, who continues to hold and operate the same.

4. That said Railroad Company had owned a line of railroad and other property in Tennessee worth several millions of dollars, and was liable to various persons by judgments for personal injuries, in sums amounting to many thousand dollars.

5. That complainant's only means of satisfaction of his claim is out of the railway property formerly owned by said Railroad Company and conveyed by said deed of trust and now held by said Railway Company as aforesaid; and that said property was by the Act of March 24th, 1877, made liable to the claim of complainant, and others, having claims for damages to persons and property in preference to the debts secured by said mortgage:

And praying that complainant have judgment against said Railroad Company for the amount of his said claim; that he have satisfaction out of said Railway property; and that said bill be filed, not only for complainant, but also for all creditors of said Railroad Company who might come in as parties.

(*See Bill, transc. pp. 8-20.*)

Appellant answered said bill, and also incorporated a demurrer in the answer:

1. It refused to admit complainant's claim; and averred that complainant, ever since the making of said contract, has been engaged at other work, and has made, or by due diligence might have made, $90.00 per month.

2. It admitted the execution of a mortgage, June 15, 1881, by said Railroad Company to said Trust Company, of all its property, &c., a sale under said mortgage, and that appellant is the owner of all said property, and in due form pleads that appellant is an innocent purchaser of said property, without notice, for $10,000,000 00 paid.

3. It denies that by the Act of March 24, 1877, it or any of said property is liable for complainant's claim.

4. It denies that complainant's claim is or ever was a lien on said property, or that complainant has any right of satisfaction upon said property.

5. It avers that complainant's claim is for a breach of contract, and not for timbers sold, nor on account of work and labor, nor for personal injuries, and is not protected by the terms of the Act of March 24th, 1877.

6. It avers that said Act was not enacted in accordance with the constitutional requirement, and is void.

7. It avers that complainant's remedy, if any he has, is upon the money paid into the United States Court for said railway property. as shown by the bill, and not upon the property in the Railway Company's hands.

8. It denies every equity set up in the bill.

(See Ans. pp. 28-34.)

The facts necessary to be stated are:

The contract sued on is a written contract, and is set out by Exhibit A to the Bill. (Trans. p. 2)

It expressly releases all claim and right of action because of said injury to the complainant, in consideration of a contract on part of the Railroad Company to retain complainant in its employment for five years, at $90.00 per month, and both parties acted under said employment until January 9th, 1885, and complainant was paid his monthly wages until then, when the Company went out of business and ceased to pay.

(See Bill, p. 11.)

And the suit and decree are for breach of this contract, and not for the injury. From January 9th, 1885, to January 9th, 1888, complainant kept a store in Knoxville, and acted as clerk and manager therein, and his work was reasonably worth at least $40.00 per month, during that period. Since then he has gone back to his business as railroad engineer, and is earning at least $90.00 per month.

(See trans. pp. 56–401 et seq.)

The said East Tenn., Va. & Ga. Railroad Company was formed in 1869, by a consolidation of the East Tennessee & Virginia and East Tenn. & Ga. Railroad Companies.

(Stipulation of Counsel, trans p. 55.)

During the pendency of the suit, many persons having judgment against said Railroad Company for personal injuries, came in by intervening petitions and asked leave to set them up.

(See pet'ns, transc. pp. —•—)

Appellant made motions to dismiss said petitions, which were overruled. More particular reference will be made to said action of the Court hereinafter.

The case was heard before Chancellor Gibson, June 24th, 1889, upon a stipulation of facts made by counsel, and upon a transcript of the decrees in cause of Central Trust Company of New York vs. E. T., V. & G. R. R. Co. et al., in U. S. Court at Knoxville, in which said Railway was sold and purchased, as aforesaid; and a decree was pronounced granting the relief sought by complainant, except that it

declared there should be deducted from the amount claimed by complainant such sums as said Frazier may have, or by due diligence might have earned by other employment; and an account was ordered to ascertain the amount due Frazier after such deductions; also to ascertain the amount of unpaid judgments and decrees due the intervening petitioners, and the basis of their judgments, and whether they came within the terms of said Act of March 24th, 1877.

(*See decree, pp. 281–292.*)

The Clerk reported the amount so due, and after exceptions by both parties, final decree was pronounced August 6th, 1889, in favor of complainant and each of the intervening petitioners, except Hunt, for the amount reported in their favor, against said Railroad Company, and decreeing further:

1. Said mortgage is not valid and binding against said judgments, and said judgment-creditors as such have right to satisfaction of said judgments out of said franchises and property.

2. Said Railroad Company at time the injuries occurred on which said judgments are based owned a line of road in Tennessee from Chattanooga to Bristol, together with equipment, franchises, &c., all of which are now held by said Railway Company by title inferior to the claims of said judgment creditors.

3. That said property, or enough thereof, be sold by the Commissioner, to satisfy the decree of complainant and intervening petitioners. From which, and all the decrees and orders in the cause, appellant appealed to this Court.

(*See decree, pp. 477–492.*)

ERRORS.

Appellant shows and assigns the following errors in said proceedings and decrees:

1.

The Court erred in decreeing that the contract between Frazier and the Railroad Company, "Exhibit A" to the Bill, was in legal effect, an agreement ascertaining and liquidating the amount of damages for which said company was liable for personal injuries received by him on January 9th, 1883, from said Railroad Company, in the operation of its railroad in Tennessee, (Decree, p. 3, 382); for said contract and agreement is by its terms and legal intent a release, discharge and satisfaction of any demand of any claim against said Railroad Company, because of said injuries, and is a contract of employment, as subsequently decreed by the Court (Same decree, p. 283). (See said contract, pp. 2-8:) and complainant's judgment in this cause is therefore for a breach of the contract of employment, and does not come within the proviso to said Act of March 24, 1877.

2.

This Court erred in decreeing "that said mortgage (of June 15, '81) through the foreclosure of which said Rail-

way Company claims title to said property, rights and franchises, (the railroad property, etc., of appellant in litigation) was executed under and in pursuance of and was subject to the provisions of the Act of Assembly of March 24, 1877, by the provisions of which the property, rights and franchises so mortgaged were made and held liable to persons having claims for timber sold to or work and labor done for the mortgagor Railroad Company, or for injuries to persons or property done or committed by said Railroad Company operating its railroad in this State, in preference to the mortgagee under said mortgage or any person claiming or holding thereunder;" for there is nothing in the record to show that said mortgage was executed by virtue of or pursuant to said Act. On the contrary it appears in the record that said East Tennessee, Virginia & Georgia Railroad Company was formed and organized in 1869. (See stipulation of counsel, p. 55) and the fact is so adjudged in this cause (Decree, p. 289) and said Railroad Company was not therefore organized or consolidated under said Act of 1877, and was not governed by it did not execute said mortgage in pursuance of it. And it appears that said mortgage was executed in pursuance of the General Laws and Statues governing such cases. (See Bill, p. 12, Decree of Foreclosure in Fed. Ct., pp. 72, et. seq.) and without proof the Court should have presumed that said mortgage was thus validly executed.

3.

The Court erred in decreeing in said Decree and its Final Decree (Tr. pp. 289-290, and 485 et. seq.) that said mortgage "is not valid and binding against the claim of Joseph E. Frazier, nor against the claims of other persons having judgments or decrees against said Railroad Company for timbers furnished and work and labor done on or for damages done to persons or property in the operation of said railroad in this State;" and that said mortgage is not valid against the judgments and decrees pronounced in this cause in favor of the complainant, and the intervening petitioners against said Railroad Company; and that the aforesaid property, rights and franchises formerly owned by said Railroad Company, but now owned by appellant, are liable to the satisfaction of said judgments and decrees; and that said property, rights and franchises be sold to satisfy said judgments and decrees.

All this is error, because of the following reasons:

1. The said Act of Assembly of March 24, 1877, chap. 72 of the Acts of 1877, and especially the *proviso* in section 3 of said Act, with regard to mortgages, is unconstitutional, null and void, for the reason that said Act embraces more than one subject, that none of the subjects so embraced are expressed in the title to said Act, that the subject embraced and covered by said proviso is not expressed in said title, and that said Act is in violation of Sec. 17, Art., 2, of the Constitution of Tennessee.

2. Said Act is entitled as follows: "An Act to Amend the Law in Relation to the Consolidation of Railways." (Acts 1877, p. 92.) Section 1 of said Act provides that certain Acts authorizing consolidation of Railroads shall apply to all railroad corporations in this State.

Section 2 provides that any railroad corporation in the State may consolidate with any other whose road connects with or intersects its road.

Section 3 provides what shall be the rights, powers, &c., of any road formed by consolidation under said Act.

Said proviso to said 3rd Section, as construed by the Chancellor, limits the power of all Railroad Companies, whether organized under that Act or not to mortgage their property.

This general legislation on the subject of railroad mortgages is not expressed or hinted at in the title of the Act.

3. Said proviso to section 3 of said Act properly construed applies only to the powers of railroads formed by virtue of the Act to mortgage their property; and has no effect upon the acts of said Railroad Company, nor upon said mortgage to the Trust Company, nor upon appellant's property acquired thereunder; because as herein before shown, said Railroad Company was organized and chartered in 1869.

4. Said Act of March 24, 1877, and said proviso thereto, were repealed by implication by the Act of February 26th, 1881, approved March 15th, 1881, and went into effect from the date of its passage, which authorizes any Railway Company, chartered by this State, to issue bonds and execute mortgages without limitation.

5. There is no law in this State giving complainant, or any of the judgment creditors of said Railroad Company, a lien upon appellant's said property or priority over said mortgage, or over appellant's rights as purchaser under it.

4.

The Court erred in decreeing that appellant is not an innocent purchaser of the said property and entitled to protection as such, (See decree, p. 288); for said plea was properly pleaded (See same, p. 32); the proof and bill showed that appellant was the purchaser at a judicial sale for $100,000.00 paid (See bill pp. 13 and 14, and decree, pp. 171 et seq.) and there is no proof that appellant had notice of any of complainant's and petitioner's claims or equities.

5.

The Court erred in not decreeing that complainant's claim and decree was not a judgment or decree for damages done to a person in the operation of said Railroad Company's road; but was for a mere breach of contract to employ complainant, and was, therefore, not within the proviso to section 3, Act of March 24th, 1877; and therefore dismissing the bill.

(*See said contract, p. 2.*)

6.

The Court erred in overruling appellant's motion to dismiss each and all of the intervening petitions, upon the 4th ground stated in said motion, which is as follows:

"Each of petitioner's claims is shown by said petition to be based on judgments which were rendered more than twelve months before the petitions were filed in this cause, and more than twelve months before the filing of the original bill, and that petitioners, by neglecting to have executions issued upon their respective judgments, and said Railroad Company's former property sold to satisfy the same, within twelve months from the rendition of the said judgments have lost any liens which they may have ever had on said property." (See motions, pp. 328–443.) Because the intervening petitions show no ground of relief not shown in the original bill and stated hereinbefore; and all of said petitions show that they are based on judgments rendered against said Railroad Company more than twelve months prior to the filing of said petitions. (See petitions pp. 298, 340 and 363, showing the dates of the judgments.)

Wherefore appellant asks a reversal of said decrees, and a dismissal of the bill and petitions, with costs.

HENDERSON & JOUROLMON,
Solicitors for Appellant.

JOSEPH E. FRAZIER
vs.
E. T., VA. & GA. R. R. Co.
et al.

Brief of Leon Jourolmon upon the Assignment of Errors.

The facts are sufficiently stated in the opening of the Assignment of Errors.

Upon the 3rd error assigned, we would respectfully urge:

1st. That the proviso of the 3rd Section of Chapter 72 Acts of 1877, relied on by complainant as his sole ground of relief against appellant, properly construed, applies only to companies organized by virtue of said Act. The function of a proviso is to limit the language in that Act; not to enlarge or extend the Act of which it is part, nor to make independent legislation.

Endlich on Int. of Statutes, Section 184, and cases there cited.

Where a proviso exceeds that use, it is void. Ib. Sec. 185.

It affects that act only. Ib. Sec. 186.

2nd. If that proviso is to be so construed as to prevent *any* railroad company in Tennessee from making a mortgage, "which shall be valid against judgments or decrees and executions therefrom for timbers furnished, and work and labor done on, or for damages done to persons or

property," &c., then so much of the act is unconstitutional and void under the Constitution of this State, Section 17, Article II.

Cannon vs. *Mathes*, 8th Heisk., 517-519.
State vs. *McCann*, 4th Lea, 1.
Gaines vs. *Whitworth*, 8th Lea, 594.
Murphy vs. *State*, 9th Lea, 374.
Ragio vs. *State*, 2d Pickle, 272.

Upon the 6th error assigned, we can find no direct authorities, and can refer only to the Code (M. & V.) Section 3,696.

Very Respectfully,

HENDERSON & JOUROLMON,
Solicitors.

Assignment of Errors and Brief filed, Sept. 14, 1889.
E. C. REEVES, Clerk.

MONDAY, SEPTEMBER 9TH, 1889.
Supreme Court at Knoxville.

Be it remembered, that at a regular term of said Supreme Court, begun and held at the court rooms in Knoxville for the Eastern Division of the State of Tennessee, on the second Monday of September, 1889, it being the 9th day of said month, there were present and presiding the Honorable Chief Justice Peter Turney and Associate Justice W. C. Folkes and W. C. Caldwell, all duly elected, commissioned and qualified according to law to hold said Court, and the Court being open for the transaction of business, the following proceedings were had:

J. E. FRAZIER
vs.
E. TENN., VA. & GA.. R. R. COMPANY. } Motion and Order.

For sufficient reasons appearing to the Court, ten days are allowed for the assignment of error.

Court adjourned until 8 o'clock to-morrow morning.

P. TURNEY,
W. C. CALDWELL,
W. C. FOLKES,
D. L. SNODGRASS.

FRIDAY, October 4th, 1889.

Court met pursuant to adjournment, present and presiding Chief Justice Peter Turney, and Associate Justices, W. C. Caldwell, W. C. Folkes, H. H. Lurton and D. L. Snodgrass. The minutes of yesterday were read and signed, and the following business transacted:

JOSEPH E. FRAZIER
vs.
E. T., V. & G. R'Y Co. } Motion.

Defendant moved the Court to extend the rule as to the hearing of cases, one half hour, which was taken under consideration.

Court adjourned until to-morrow at 8 o'clock a. m.

P. TURNEY,
HORACE H. LURTON,
W. C. FOLKES,
D. L. SNODGRASS.

SATURDAY, October 26th, 1889.

Court met pursuant to adjournment, present and presiding Chief Justice Peter Turney, and Associate Justices, W. C. Caldwell, W. C. Folkes, Horace H. Lurton and D. L. Snodgrass. The minutes of yesterday were read and signed, and the following business transacted:

JOSEPH E. FRAZIER
vs.
E. T., V. & G. R. R. Co., *et als.* } Decree.

This cause came on to be heard on the transcript of the record from the Chancery Court of Knoxville, on the appeal of respondent, the East Tennessee, Virginia & Georgia Railway Company, the writ of error of the complainant, Joseph E. Frazier, and the assignments of error by both said parties, and was argued by counsel and taken under advisement by the Court; and thereupon on consideration, it was, on this, 26th day of October, 1889, ordered adjudged and decreed by the Court as follows:

1st. That the assignment of errors by the complainant is well taken, and the same are therefore sustained.

2nd. That the assignment of errors by the respondent is not well taken and is therefore overruled.

3rd. That the decree of the Chancellor, that there should be deducted from the amount of liability of the East Tenn., Va. & Ga. R. R. Co., to the complainant, such sums of money as he may have made by his work in other employment or business after the 6th of January, 1885, and accordingly deducting from the amount specified in the contract sued on the sum of $1,491.00 be reversed, and that complainant, Joseph E. Frazier, accordingly have and recover of the defendant Company the full amount promised him in said contract without deduction or abatement, to-wit: Principal $3,834.10 and interest thereon from August 1st, 1889, to this date, $54.82, amounting to three thousand eight hundred and eighty-eight 92-100 dollars ($3,888.92.)

4th. That in all other particulars the decree of the Chancellor is correct and is affirmed.

5th. That the cause be remanded to the Chancery Court at Knoxville, for the execution of the decree and further proceedings according to the opinion of this Court.

6th. That the costs of this cause in this Court be paid by the appellant, the East Tenn., Va. & Ga. Railway Company, and its sureties, W. A. Henderson and Leon Jourolmon, and in the Court below as decreed by the Chancellor—for which executions are awarded.

7th. And on application of Messrs. Ingersoll & Peyton, solicitors for complainant, the lien for fees in their favor on complainant's recoveries, declared by the Chancellor, is continued and enlarged, so as to include services in this cause, in this Court.

Court adjourned to meet Monday morning at 8 o'clock.

P. TURNEY,
W. C. CALDWELL,
HORACE H. LURTON,
D. L. SNODGRASS,
W. C. FOLKES.

MONDAY, October 28th, 1889.

Court met pursuant to adjournment, present and presiding Chief Justice Peter Turney, and Associate Justices, W. C. Caldwell, W. C. Folkes, Horace H. Lurton and D. L. Snodgrass. The minutes of Saturday were read and signed, and the following business transacted:

JOSEPH E. FRAZIER
vs.
THE E. T., VA. & GA. RY. CO. *et al.* } DECREE MODIFIED.

In this cause on application of appellant, E. Tenn., Va. & Ga. Railway Co., it is ordered that the decree entered on a former day be modified as follows, this being added to and made part of former decree. Upon the argument of this cause it was insisted that under the charter of the E. T., V. & Ga. R. R. Co. there was power and authority to make the mortgages of 1881, and that by the subsequent legislation of this State this charter power could not be limited or affected in any way in that the charter was a contract that could not be affected by subsequent legislation, the Court decreeing that the charter power was limited to the execution of a mortgage to secure bonds issued to complete and put in operation the line of railway contemplated by the charter granted in 1847 to the E. T. & VA. R. R. Co., and that it not being alleged in the pleadings or shown in proof that the mortgages of 1881 were executed for bonds issued to complete said road or put it in operation or in renewal of such bonds, that it would not therefore presume these bonds to have been issued under the limited authority of the charter and that the Act of 1877 did not therefore impair the con-

tract contained in said charter, and was valid and not obnoxious to the Constitution of this State or that of the United States.

The decree of former day in all other respects will stand as entered of record.

Thereupon this Court adjourned to Court in course.

P. TURNEY,
W. C. CALDWELL,
W. C. FOLKES,
HORACE H. LURTON,
D. L. SNODGRASS,
T. S. WEBB, Special Judge.

SUPREME COURT OF THE UNITED STATES.

I, James H. McKenney, Clerk of the Supreme Court of the United States, do hereby certify that the foregoing manuscript pages, numbered from one to eighty-one, inclusive, contain true extracts from the transcript of the record in the case of The East Tenn., Va. & Ga. R'y Co., plaintiff in error, vs. Joseph E. Frazier, et al., No. 1407, October term, 1890, as the same remains upon the files of said Supreme Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Supreme Court, at the City of Washington, this 2nd day of February, A. D., 1891.

[SEAL.]

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

EAST TENN., VIRGINIA & GEORGIA RAILWAY CO.,
PLAINTIFF IN ERROR,

vs.

JOSEPH E. FRAZIER, *et al.*

No. 1407.

ERROR TO THE SUPREME COURT OF TENNESSEE.

ON MOTION TO DISMISS OR AFFIRM.

BRIEF FOR APPELLANT.

WM. M. BAXTER,
Of Counsel.

S. D. NOWLIN & CO., PRINT, KNOXVILLE.

IN THE

Supreme Court of the United States.

October Term, 1890.

East Tennessee, Virginia & Georgia Railway Company, Plaintiff in Error, *vs.* Joseph E. Frazier *et al.*	No. 1407.

ERROR TO THE SUPREME COURT OF TENNESSEE.

ON MOTION TO DISMISS OR AFFIRM.

BRIEF FOR APPELLANT.

The amount involved in this suit is between *forty and fifty thousand dollars.*

The attempt, in submitting the case upon a motion to dismiss or affirm, is to have *a hearing upon the merits*, in advance of reaching the case on the regular call of the docket. It is not a case that can be advanced upon motion.

This being so, a hearing upon the merits is sought by attempting to use Rule 6 for that purpose. It is respectfully submitted that Rule 6 was never framed for any such use or purpose. It was probably intended for cases where an appeal lies as a matter of right or where the allowance of the writ of error is simply a clerical act.

In the present case the Supreme Court of Tennessee delivered an elaborate opinion, and at its very outset, as the very *first* objection to be removed—at the very threshold—disposed of the constitutional question, which it is now insisted by this motion is not in the case; or if in it, is so frivolous as to need no further argument. In its *final judgment* the State Supreme Court recite that the constitutional question was made, and overruled, and in its said final judgment it set forth its reasons for its action. The decision of the constitutional question was absolutely necessary to a decision of the case. To have allowed the constitutional objection interposed would have defeated the suit of the complainants.

In addition to this the Chief Justice of the State Court allowed the writ of error, and accepted a bond, which operated as a supersedeas; thus clearly evidencing the opinion of the State Court that a constitutional question was involved and of so serious a nature that it would be unjust to permit its decree to be executed, until this Court had deliberately passed upon that question, upon its merits.

There is nothing in the suggestion that the constitutional objection was not pleaded or embraced in the assignments of error.

The charter was in evidence. It was a contract protected

by the National Constitution. Any State law which violated that contract was powerless to deprive the Respondent of its constitutional protection, and, as against such chartered rights, is null and void, and must be so declared.

1st Wallace, pp. 116–155.

The constitutional protection involved has been denied by the State Court. That the reason assigned for such denial is found in what is alleged to be the *proper construction* of State statutes (i. e. the charter) is immaterial. If such a position were allowed to defeat the jurisdiction of this Court, it would only be necessary to beg the question in order to defeat the writ of error. For it is a begging of the question to say that, the charter being a State statute, and a State Court having construed it to mean a certain thing, which construction makes no case for constitutional protection, therefore no constitutional question is involved! In so far as the protection of the constitution is invoked, these so-called "State statutes" (i. e. the charter) *constitute a contract.*

The construction placed upon them by the State Court is not binding upon this Court, when *it* is asked to determine whether the obligation of that contract has been violated by subsequent legislation.

This Court will first decide for itself what the contract is, and then whether or not the obligation of that contract has been violated.

6th How., p. 327.

1st Wall., pp. 116–155.

So much as preliminary.

STATEMENT OF CASE.

Prior to 1869 there existed under the laws of Tennessee two distinct railroad corporations, to-wit: the East Tennessee & Virginia Railroad Company, and the East Tennessee & Georgia Railroad Company. By reason of State bonds previously loaned to them under the Internal Improvement Law of 1851-2, and amendments thereto, both of these companies became indebted to the State in large sums. By an act passed February 25, 1869, railroad companies so situated were permitted to consolidate and adopt the name and charter of either of the consolidating companies. These two companies consolidated under said act of 1869, adopting the name and charter of the East Tennessee & Virginia Railroad Company. Afterwards, on December 17, 1869, by an act of the Legislature of Tennessee, the name of the consolidated company was changed from East Tennessee & Virginia Railroad Company, to East Tennessee, Virginia & Georgia Railroad Company, one of the respondents in this cause, in the State Court.

By the 15th section of its charter said company has power to "mortgage its charter and works."

By an act passed February 2, 1871, approved February 3, 1871, entitled "An Act to encourage the retirement of the State debt incurred by issuance of State bonds to railroad companies," any railroad company in the State was authorized to issue company bonds in such an amount and bearing such rate of interest, not exceeding the legal rate of interest at the place where payable, as might be determined upon by stockholders representing the majority of all the stock in the company of which bonds were proposed to be issued, and might secure the payment of such bonds, prin-

cipal and interest, by mortgage of the franchises, road-bed, superstructure, equipment and property of every description of such railroad company.

(Acts of 1870–71, chap. 116, p. 134.)

In chapter 151 of the Acts of 1852, which is entitled "An Act to establish a system of Internal Improvements in this State," and one of the most notable of the public Acts that has ever been passed by the Tennessee Legislature, in its first section enacts that "whenever the East Tennessee & Virginia Railroad Company shall have procured bona fide subscriptions for the capital stock in said company to an amount sufficient to grade, bridge, and prepare for the iron rails the whole extent of the main trunk line proposed to be constructed by said company, and it shall be shown by said company to the Governor of said State that said subscriptions are good and solvent, and whenever said company shall have graded, bridged, and shall have ready to put down the necessary timbers for the reception of rails and fully prepared a section of 30 miles of said road at either terminus in a good and substantial manner, with good materials for putting on the iron rails and equipment, etc., * * * then said Governor shall issue to said company coupon bonds of the State of Tennessee to an amount not exceeding eight thousand dollars per mile on said section, etc." Section third provides that "so soon as the bonds of the State shall have been issued for the first section of the road, as aforesaid, they shall constitute a lien upon said section, * * * and the State of Tennessee upon the issuance of said bonds, and by virtue of the same, shall be invested with said lien, or mortgage, without a deed from the company for the payment by said company of said bonds with interest thereon as the same becomes due." By section four, it is provided that "when

SAID COMPANY shall have prepared, as aforesaid, a second section * * as provided in the first section of this Act, and the Governor shall be notified of the facts as before provided, he shall in like manner issue to said company like bonds of the State of Tennessee to an equal amount with that before issued under the first section of this Act, for each and every section of twenty miles of said road so prepared as aforesaid, * * * and upon the issuance of said bonds the State of Tennessee shall be invested with like mortgage or lien without a deed from said company, upon said stock and upon said first and additional section or sections of said road so prepared upon the rails and equipments put or to be put upon the same for the payment of said bonds and the accruing interest thereon, * * * and after the Governor shall have issued bonds for the first section of the road it shall not be lawful for *said company to give*, create or convey to any person or persons or body corporate whatever, any lien, incumbrance or *mortgage* of any kind which shall have priority over or come in conflict with the lien of the State herein secured, and any such incumbrance or *mortgage* shall be null and void as against said lien or mortgage of the State, and said lien or mortgage of the State shall have priority over all other claims existing or to exist against said company." The foregoing provisions of the Internal Improvement Act of 1851–2 expressly recognize the existence of the East Tennessee & Virginia Railroad Company, and its rights under its charter to mortgage its property: the Act of 1851–2 only limiting what the effect of such mortgage shall be as against the lien created in favor of the State by the issuance of its Internal Improvement Bonds.

Under chapter 36, of the Acts of 1869–70, which is entitled "An Act to amend an Act passed February 25, 1869, and to

permit railroads to select a new name," the East Tennessee, Virginia & Georgia Railroad Company, is expressly authorized;

"To issue bonds running to maturity, at such date, and bearing such rate of interest as may be deemed best with which to retire the State debt under the provisions of the Act of February 25, 1869."

So it will be seen that the East Tennessee, Virginia and Georgia Railroad Company was authorized to execute the mortgage involved in this case:

1. By the 15th section of its original charter.

2. By the recognition of its power to mortgage its property in the Internal Improvement Act of 1852.

3. By the Act of December 17, 1869, authorizing it to issue bonds, which, taken in connection with the general law, implies the right to make a mortgage to secure such bonds.

4. By the Act of February 2, approved February 3, 1871.

This legislation was all prior to the Act of March 24th, 1877. The Act under which the East Tennessee, Virginia & Georgia Railroad Company (the mortgagor) became a consolidated company was passed in February, 1869. As such consolidated company it was authorized by the Act of December, 1869, to mortgage its property, generally, without limitation as to the effect of such mortgage.

An analysis of the Act of March 24th, 1877, (see Appendix), will show that the intention of the Legislature was to extend the Acts of 1871 and 1875, so as to authorize a class of corporations to consolidate that were not mentioned by the Acts of 1871 and 1875.

Under the Act of 1871, the power to consolidate itself with any other railroad corporation whose road should connect with it or intersect it, was confined *to corporations of this State alone.* (See Appendix.)

The Act of 1875, which is supplementary to the Act of 1871 upon the subject of consolidation, extends the right of consolidation to another class of corporations, to-wit: "Railroad companies existing under the joint legislation of this and another State or States, and railroad companies incorporated by this or other State or States whose roads connect with or intersect each other in this or any other State." (See Appendix.)

The Act of 1877, which is an amendment of the Acts of 1871 and 1875, extends the right of consolidation to still another class of railroad corporations not embraced either in the Act of 1871 or the Act of 1877, to-wit: "Railroad companies existing by virtue of the statutes of another State, ratified or confirmed by the authority of the State of Tennessee."

The intention of each Act is to authorize consolidations, *to be effected*, and the Acts of 1875 and 1877 are merely intended to enlarge the number or classes of corporations that might desire to take the benefit of this legislation, and make consolidations thereunder.

In every section of the Act of 1877 will be found language evidencing the fact that the Legislature intended that that Act, as well as those to which it was supplementary, should have *prospective* force only, from their respective dates.

The proviso to the first section of the Act of March 24, 1877, is to the effect that no railroad corporation indebted to the State of Tennessee *shall be entitled* to the benefit of said Acts or of this Act *until* such corporation shall have fully paid off and discharged all of such indebtedness *actually due at the date of such consolidation.*

By the second section, roads authorized to consolidate with each other must connect with or intersect each other,

and the terms and conditions of the consolidation shall be agreed upon in writing between such corporations respectively. No such consolidation shall be consummated until it and the terms thereof shall have been approved by a majority of the stockholders of such *consolidating* companies, and the *agreement of consolidation*, together with the evidence of the approval thereof by the stockholders, *shall be filed* in the office of the Secretary of State, and by him recorded; and *no such agreement of consolidation shall be of any force or effect until the consolidating companies shall have paid off* and discharged all indebtedness, if any, actually due by them, or either of them, to the State of Tennessee *at the date of such consolidation.*

The third section provides the manner in which the *new corporation* shall be organized, and the new company is given power to fix the number of its directors; the number, names, and duties of its officers; and power to pass by-laws for the government of the new company and the management of its affairs; the power to fix the amount of its capital stock and issue bonds, and dispose of the same in such form and denomination and bearing such interest as the Board of Directors may determine, and to secure the payment thereof by mortgage upon all the property and franchises of the new company and all the companies from which it is formed, and to do all other acts and things which the said companies *so consolidating*, or either of them, might have done *previous to such consolidation.* The remaining part of the Act contains the three provisos, the third of which is relied upon by the complainants in this cause.

From this analysis of the Act of 1877 it is manifest that the intention of the Act is to authorize *future consolidations*, and not to restrict the powers of corporations already in existence; and the third proviso to the third section, should

be read as limiting only the powers of corporations *formed by consolidation under the Act of 1877.*

Endlich on Statutes, Sec. 184-5-6.

The stipulation of facts, and the final decree in this cause, in the inferior State Court, both show that the only consolidation to which the East Tennessee, Virginia & Georgia Railroad Company was ever a party *was consummated prior to Act of December 17, 1869;* and if there ever had been any consolidation to which it was a party, AFTER the passage of the Acts of 1871, 1875, or 1877, the evidence of such fact, by the express provisions of those Acts, would have had to have been filed in the office of the Secretary of State; and it devolves upon the complainant, in order to make out his case, if the fact be so, *to show it by such record. It was conceded by complainant's counsel, in the argument of the cause, in the State Court, that there never had been any consolidation subsequent to 1869.*

ASSIGNMENT OF ERRORS.

1.

The State Court erred in construing the charter of the East Tennessee, Virginia & Georgia Railroad Company in the matter of its power to mortgage its property.

2.

The State Court erred in holding that the Act of March 24th, 1877, did not violate the obligation of the contract contained in said company's charter as originally granted and amended.

3.

The State Court erred in holding that the Act of March 24th, 1877, did not violate the obligation of the contract contained in the mortgage under which the plaintiff in error became the owner of the property of the East Tennessee, Virginia & Georgia Railroad Company, by foreclosure of the same.

4.

The State Court erred in denying to the plaintiff in error the constitutional protection guaranteed in Art. I, Sec. 10, of the Constitution of the United States.

5.

The State Court erred in refusing to hold that said Act of March 24th, 1877, was violative of Art. I, Sec. 10, of the Constitution of the United States, and therefore void.

BRIEF.

There can be no pretense that there is no federal question involved. This is conceded by the State Supreme Court as *raised* and *insisted upon*, and is *expressly decided*, both in its opinion, and in the final judgment, entered in the cause.

"The original rule allowing a motion to affirm to be "united with a motion to dismiss was promulgated May "8th, 1876, and in *Whitney vs. Cook*, 99 U. S. 607, decided "during the October Term, 1878, it was ruled that *the motion "to affirm could not be entertained, unless there appeared on "the record at least some color of right to a dismissal.* This "practice has been steadily adhered to ever since."

113 U. S., 689.
128 " 582.
129 " 47.

There being no color of right to a dismissal, the motion to dismiss must be denied, and with it the motion to affirm must fail also.

It is respectfully submitted that in advance of the record being printed, and upon a few extracts selected with a view of sustaining the motion, this cause should not be heard *upon its merits*, simply upon the briefs of counsel. A proper consideration of the question presented, involves an examination and construction of the charter of the East Tennessee, Virginia & Georgia Railroad Company, as originally granted and as subsequently amended; various Acts of the Tennessee Legislature; the subsequent legislation which, it is insisted, violates chartered rights; the proceedings of foreclosure under which the mortgage was foreclosed, and the Act, under which plaintiff in error was incorporated, etc., etc., as well as the record at large in this cause, *only a small portion of which* has been made an appendix to the brief of counsel appearing for the motion, and *all of which* is necessary to a proper and correct understanding and decision of the constitutional question involved.

The appellant does not desire to submit this cause on the merits, *on printed briefs*, and for this reason, also, it opposes this motion, which is an effort to force such a hearing. Appellant desires to be heard orally, by counsel, upon a complete (printed) record, in order that it may present to the Court *in banque* its grounds for a reversal of the decree of the State Supreme Court. For this reason, we have done nothing more than simply to state the case. We have not attempted to argue it. We prefer to reserve that for presentation to the full bench, by oral argument. In view of the following language in the opinion of the State Supreme Court in deciding the cause, we think we should be allowed

to do this; that language is: "We now come to the prin-
"cipal question, which involves the right of complainants
"as judgment creditors, the judgments being mainly for
"personal injuries sustained in the operation of the road
"in this State, to satisfaction out of the property of the
"old corporation in the possession and ownership of the
"East Tennessee, Virginia & Georgia Railway Company."

* * * * *

"The Railway Company interposes a number of objec-
"tions going both to the applicability and constitutionality
"of this provision, to the mortgages under which they
"claim title. The *first* is, that under the charter of the old
"company it had power to mortgage, and that this general
"power conferred in their charter is a contractual right
"which could not be affected by any subsequent legislation
"limiting the power conferred."

Appellant, therefore, respectfully submits that neither the motion to dismiss or affirm should be allowed. On the contrary they should be disallowed, and the cause stand for hearing, upon oral argument upon the regular call of the docket.

WM. M. BAXTER,
of Counsel for Appellant.

APPENDIX.

AN ACT to Amend an Act, Passed February 25, 1869, and to Permit Railroads to Select a New Name.

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That if any of the railroads of this State shall consolidate their interests and franchises, as provided by An Act of the General Assembly, passed February 25, 1869, they are hereby authorized to adopt the name of either of the roads so consolidating, or a combination of the names of all the roads, or a new name; *Provided*, however, that the adopting of said new name shall not release either one of the roads from any and all liabilities they are separately under, to the State of Tennessee, under and by the laws of this State; and, *provided further*, that, under their new name, the railroads thus consolidated, shall succeed to all the privileges and immunities, and be subject to all the liabilities of the respective roads existing previous to their consolidation; *provided further*, that said consolidation shall not operate so as to abate any suit pending at the time of consolidation in favor of or against either of said roads so consolidating.

SEC. 2. *Whereas*, The East Tennessee and Virginia and the East Tennessee and Georgia Railroad Companies, have consolidated into one corporation, under the provisions of An Act entitled "An Act to liquidate the State debt created in aid of railroads," passed the 25th day of February, 1869; and, *Whereas*, it is desirable that the consolidated company's name should carry into it the names of the consolidated companies;

Be it therefore enacted by the General Assembly of the State of Tennessee, first: That the name of the consolidated company is hereby changed from the East Tennessee and Virginia Railroad Company, to the East Tennessee, Virginia and Georgia Railroad Company; and that the shares in said company shall be one hundred dollars, with quarter, half and three-quarter shares, representing twenty-five, fifty and seventy-five dollars; and these fractional shares shall be entitled to fractional votes in the meetings of said company. 2. The company is hereby authorized to issue

bonds running to maturity, at such date, and bearing such rate of interest as may be deemed best, with which to retire the State debt, under the provisions of the Act of the 25th of February, 1869; and all laws and parts of laws in conflict with these provisions, are hereby repealed: *Provided*, that the issuance of the bonds hereby authorized, shall, in no way, impair any liens reserved by the State, on either of said roads so consolidating, except as provided in said Act of 25th of February, 1869.

SEC. 3. *Be it further enacted*, That this Act shall take effect from and after its passage.

W. O'N. PERKINS,
Speaker of the House of Representatives.
D. B. THOMAS,
Speaker of the Senate.

Passed December 17, 1869.

(Acts of Tennessee, 1869–'70, chap. 36, pp. 45–6.)

AN ACT to Encourage Retirement of the State Debt Incurred by the Issuance of State Bonds to Railroad Companies.

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That either or any of the Railroad Companies in this State may issue their respective company bonds, in such amount, and bearing such rate of interest, not exceeding the legal rate of interest at the place where payable, as may be determined on by stockholders representing a majority of all the stock in the company of which bonds are proposed to be issued; and may secure the payment of such bonds, principal and interest, by mortgage of the franchises, road-bed, superstructure, equipment and property of every description of such Railroad Company; *provided*, the mortgage above authorized shall not be so construed as to interfere with prior liens, especially the liens of the State in the existing mortgage in favor of the State; *and provided further*, that nothing herein contained shall be construed in any way to impair or diminish the priority of the State's lien upon the property which may be mortgaged as herein provided for; and expressly bonds which have been or hereafter may be issued by the State, shall be and remain a first lien on all property of every description, of the railroad company to which said bonds may have been issued.

SEC. 2. *Be it further enacted*, That this Act take effect from and after its passage, the public welfare requiring it.

Passed February 2, 1871.

W. O'N. PERKINS,
Speaker of the House of Representatives.

D. B. THOMAS,
Speaker of the Senate.

Approved February 3, 1871.

D. W. C. SENTER,
Governor.

(Acts of Tennessee, 1870–71, chap. 116, pp. 134–5.)

AN ACT granting certain powers to existing Railroad Corporations.

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That every existing Railroad corporation in this State, whether created under a general or special law, shall have the right and the power to acquire by purchase, or other lawful contract, and have, hold, use and operate any railroad with its franchises belonging to any other railroad corporation; and likewise to have, hold, use and operate any such railroad with its franchises which it may have heretofore purchased or acquired; and also the power to borrow money and to issue its bonds therefor, or for any other indebtedness or liability which it may incur or have incurred in the exercise of its lawful purposes, and to secure the payment of such bonds, with the interest thereon, by a mortgage of the whole, or any part of its railroad and equipments and other property and franchises, containing such provisions as its Directors shall approve; and also the power to consolidate itself with any other Railroad corporation whose road shall connect with or intersect the road of such existing Railroad corporation, or any branch thereof; and so to consolidate itself upon such terms and conditions and under such corporate name as shall be agreed upon in writing between such corporations respectively: *Provided*, that nothing herein contained shall affect or impair in any way any mortgage, right, lien or priority of the State of Tennessee, or the rights of any creditors of such corporations; and that no such consolidation shall be consummated, or be complete, until it and the terms and conditions thereof shall have been approved by a majority of the stockholders of such consolidating companies respectively; and *provided further*, that the agreement for such consolidation, together with the evidence of

the approval thereof by such stockholders, shall be filed in the office of the Secretary of State.

SEC. 2. *Be it further enacted*, That no Railroad incorporation indebted to the State of Tennessee, on account of its bonds issued to such road in aid of its construction shall be entitled to the benefits of this Act until such road shall have fully paid off and discharged such indebtedness; *Provided*, that this section shall not have the effect to impair or repeal any Act passed by this General Assembly, but the same shall apply alone to the provisions of this Act. And that this Act shall take effect from and after its passage, the public welfare requiring it.

Passed December 11, 1871.

JAMES D. RICHARDSON,
Speaker of the House of Representatives.

JOHN C. VAUGHN,
Speaker of the Senate.

Received at Executive Office December 12, 1871, and approved December 12, 1871.

JOHN C. BROWN,
Governor.

(Acts of Tennessee, 1871, chap. 69, pp. 59–60.)

AN ACT relating to consolidation of Railroad Companies, supplementary to the Act approved the 12th day of December, A. D., 1871, entitled "An Act granting certain powers to existing Railroad corporations."

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That the Act of the General Assembly of this State, approved the 12th day of December, A. D., 1871, entitled "An Act granting certain powers to existing railroad corporations," shall extend and apply to consolidations between railroad companies existing under the joint legislation of this and another State or States, and railroad companies incorporated by this, or another or other State or States, whose roads connect with, or intersect each other in this or any other State, and the said Act shall be so construed; and all such consolidations heretofore made are hereby ratified and confirmed, notwithstanding the former companies may have been indebted to this State, as set forth in the second Section of the Act, to which this is a supplement; *Provided*, however, that all indebtedness actually due, and existing at the date of such consolidation, shall have been heretofore paid, or shall be paid in full, within

sixty (60) days from the date of this enactment; and *Provided further*, that nothing in this Act shall, in any way, affect or impair any mortgage, right, lien or other claim of the State of Tennessee; but such mortgage, right, lien or other claim shall continue unimpaired until it is discharged under the provisions of this or the original Act.

SEC. 2. *Be it further enacted*, That nothing in this Act shall be construed to give any right or rights of way in, through or over any territory, county, district or municipality not heretofore given by legislative Act, and is this intended to reserve any cession of such right, not revoking any hitherto given by general law, and to express in words that none such is hereby given.

SEC. 3. *Be it further enacted*, That nothing in this Act shall be so construed as to prevent taxing railroads by any law hereafter taxing railroads.

SEC. 4. *Be it further enacted*, That this Act take effect from and after its passage, the public welfare requiring it.

Passed March 11, 1875.

LEWIS BOND,
Speaker of the House of Representatives.
THOMAS H. PAYNE,
Speaker of the Senate.

Approved March 12, 1875.

JAMES D. PORTER,
Governor.

(Acts of Tennessee, 1875, chap. 51, pp. 48–9.)

AN ACT to amend the Law in relation to the Consolidation of Railways.

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That the Act of the General Assembly of this State as to consolidation of railroads, approved the first day of December, 1871, and the Act of the General Assembly of this State, approved March 12, 1875, entitled "An Act relating to Consolidation of Railroad Companies," supplementary to the Act approved the 12th day of December, 1871 (page 59, Acts 1871), entitled "An Act granting certain powers to existing railroad companies," shall extend and apply to all railroad corporations now existing or hereafter to be created in this State, whether under a general or special law or laws, or by virtue of statutes of any other State, ratified and confirmed by the authority of the State of Tennessee; *provided*, that no railroad corporation indebted to the State of Tennessee shall be entitled to the

benefit of said Acts or of this Act, until such corporation shall have fully paid off and discharged all such indebtedness actually due at the date of such consolidation.

SEC. 2. *Be it further enacted*, That any Railroad Corporation existing, or which may hereafter exist in this State, whether created under a general or special law, or existing by virtue of charter or law of this State or of any other State, ratified by this State, and authorized to maintain and operate a Railroad within this State, shall have the right and power to consolidate itself with any other Railroad Corporation whose road shall connect with or intersect the road of such Railroad Corporation, or any branch thereof; upon such terms and conditions, and under such corporate name as shall be agreed upon in writing between such corporations respectively. *Provided*, That nothing herein contained shall affect or impair in any way any mortgage, right, lien, or claim of the State of Tennessee, or the rights of any creditor of such corporations, and that no such consolidation shall be consummated or be completed until it and the terms thereof shall have been approved by a majority of stockholders of such consolidating companies, respectively; *and provided further*, that the agreement of such consolidation, together with the evidence of the approval thereof by such stockholders, shall be filed in the office of the Secretary of State and by him recorded; *and provided further*, that such agreement of consolidation shall not be of any force or effect until said Railroad Company or Companies shall have paid off and discharged all indebtedness, if any, actually due by them or either of them to the State of Tennessee at the date of such consolidation.

SEC. 3. *Be it further enacted*, That the said corporation so formed by the consolidation of two or more railroad corporations, as aforesaid, shall have, possess and exercise, all the rights, powers, privileges, immunities, and franchises, and be subject to all the duties and obligations, (not inconsistent with the provisions of this Act) conferred and imposed by the laws of this State upon such companies so consolidating, or either of them. And said consolidated company shall have power to fix the number of its directors and the time of their election; the number, names and duties of its officers; to pass by-laws for the government of the company, and the management of its affairs; to fix the amount of its capital stock, which shall be divided into shares of $100 each, and issue bonds and dispose of the same in such form and denomination, and bearing such

interest as the Board of Directors may determine, and to secure the payment thereof by mortgage of every and all the property and franchises of said consolidated company and of the companies from which it was formed; and to do all other acts and things which the said companies, so consolidating, or either of them, might have done previous to such consolidation; *Provided*, That nothing in this Act shall be understood or construed to give or to transfer to, or confer upon, any such consolidated company, or company or person operating such consolidation of railroads, as provided for in this Act, or in any other law of this State, any franchise, right, power, immunity or exemption not now granted by the laws of this State to the Railway Companies which may form part of such consolidated company. *Provided further*, that no exemption from taxation under the revenue laws of this State, of railroad property and franchises, and capital stock thereon, contained in railway charters or other railway law of this State, shall be by this act, or any other law of this State providing for such consolidation, transferred to or conferred upon such consolidated company, or the property and franchises and capital stock therein, of such consolidation of railroads, or of the property appertaining thereto and used in the operation thereof; and that the State shall have the power, by appropriate legislation, to prevent unjust discriminations against, and extortions for, freights and passage over all railroads in this State; *and provided further*, that no Railroad Company shall have power under this act or any of the laws of this State, to give or create any mortgage or other kind of lien on its railway property in this State, which shall be valid and binding against judgments and decrees and executions therefrom, for timbers furnished and work and labor done on, or for damages done to persons and property in the operation of its railroad in this State.

Sec. 4. *Be it further enacted*, That this Act take effect from and after its passage, the public welfare requiring it.

Passed March 23, 1877.

Edwin T. Taliaferro,
Speaker of the House of Representatives.

Hugh M. McAdoo,
Speaker of the Senate.

Approved March 24, 1877.

Jas. D. Porter,
Governor.

(Acts of Tennessee, 1877, chap. 72, pp. 92–4.)

AN ACT as to the sale of railroads under mortgage, granting certain powers to purchasers, and authorizing incorporation of purchasers.

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That the purchasers of any railroad chartered by this State, and lying in whole or in part in this State, which is sold under any mortgage heretofore or hereafter executed by it, who shall be, under said sale, put in possession of said railroad by any court of competent jurisdiction, shall have the same rights to operate the same in this State as the incorporated company which executed said mortgage had by the laws of the State.

SEC. 2. *Be it further enacted*, That in case of any railroad company chartered by this State or other State, and whose road lies in part or in whole in this State, which has heretofore mortgaged its franchises, roadbeds, superstructures, and property of every description, as provided or allowed in the Acts of this State (Acts of 1870–1871, Chapter 116, passed February 2, 1871), or other law or laws, and said mortgage shall afterward be foreclosed in any court of this [State] or of the United States having jurisdiction thereof, by sale under said mortgage, then and in that case the purchasers at said sale shall, by virtue thereof, be entitled to and be invested with the said franchises and property, and with all the rights, privileges and immunities appertaining thereto by the laws of this State in the Act of Incorporation of said company, and the amendments thereto, and the general internal improvement law, or other laws of this State, in as full a manner as the said company or companies are or were; *Provided*, that nothing herein contained shall be so construed as to exempt said railroad and its property from liability to State, county, and municipal taxation; *and provided further*, that the purchasers waive any right of exemption from taxation, if any existed in the original charter, or other law of this State, in favor of such railroad property, or stock therein.

SEC. 3. *Be it further enacted*, That the purchasers of such railroad, its property and franchises, may, after being put in possession of said property under such sale, meet together, adopt a name for the company or corporation to operate said railroad, and elect a Board of Directors of such members as they may see fit, not less than three, at least one of whom shall reside in this State, and in such meeting of said purchasers every person interested in the said purchase shall be entitled to one vote for every $100 of such interest, unless the number of votes to which each party shall be

entitled, and the mode of representing the interests of the purchasers shall have been previously agreed upon among the parties interested in said purchase; and the said Board of Directors shall proceed to elect a President, and such other officers as may be expedient for the proper management of said property, fix their compensation and duties, and adopt by-laws for the government of said company, not inconsistent with the laws of this State, and shall fix the amount of the capital stock of said company, and the amount of stock or bonds, or both, which shall represent the interest of said purchasers, dividing such stock into shares of $100 each. The said Board of Directors shall make a certificate showing the name of the corporation, the amount of its capital stock, the shares into which the same is divided, the number and residence of the Board of Directors, where the road lies, and the name or names by which it has heretofore been chartered and known, and shall cause the same to be signed by the President and the members of such Board, and to be filed with the Secretary of State of this State; and thereupon the said purchasers shall be a body corporate, under the name so adopted, with all the rights, powers, privileges, immunities and franchises possessed under the laws of this State by the company or companies whose road and franchises were sold as aforesaid, under the acts of incorporation thereof, or any amendments thereto, any subsequent act or acts of this State, and with all the rights, powers, privileges and franchises possessed by the corporation formed and organized for the building of railroads under Act 1, [Art. 1] Chap. 4, Title 9, or other provisions of the Code of this State. And said Board of Directors shall issue to the parties interested in the purchase of said railroad, shares of the capital stock thereof of $100 each, to such amount as they shall determine, in proportion to their rights and interests in the property, which shares shall be fully paid, and not liable to calls, and also such bonds and obligations as they may determine; *Provided*, that no railroad company or corporation shall have the power under this Act, or any other law of this State, to create a mortgage or other kind of lien on its property in this State which shall be valid and binding against judgments or decrees, and executions therefrom, for timbers furnished or work and labor done on its road, or for damage done to persons and property in the operation of its road in this State; *and provided further*, that this State shall have such powers over the operations of all railroads in this State as to prevent, by appropriate legislation, unjust discrimination against and extortions for freight and passage over such railroads.

SEC. 4. *Be it further enacted*, That nothing in this Act contained shall be so construed as to interfere in any manner with valid prior mortgage liens, if any, upon the property, rights, franchises and privileges of the company, whose road may be sold as aforesaid, nor in any way to impair, modify, or diminish the right of priority of any lien this State may have on the property so sold.

SEC. 5. *Be it further enacted*, That nothing herein contained shall be construed as giving to the purchasers of any road any rights, immunities or privileges that had been forfeited previous to the purchase, whether said forfeitures had been declared or not, nor to give, nor shall anything herein contained be construed to give the said roads any claim against the State of Tennessee under the internal improvement laws, nor shall they have any exemption from taxation, nor to give the purchasers any right or exemption from taxation, by the State of Tennessee or any counties or municipalities through which said roads may pass, which were granted under the original charters of the railroads purchased, or other laws of this State.

SEC. 6. *Be it further enacted*, That this Act take effect from and after its passage, the public welfare requiring it.

Passed March 12, 1877.

EDWIN T. TALIAFERRO,
Speaker of the House of Representatives.
HUGH M. MCADOO,
Speaker of the Senate.

Approved March 16, 1877.

JAS. D. PORTER,
Governor.

(See Acts of Tennessee, 1877, chap. 12, pp. 17-20.)

Office Supreme Court U. S.
FILED,
APR 25 1891
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

No. 1407—October Term, 1890.

EAST TENNESSEE, VIRGINIA & GEORGIA RAILWAY COMPANY. Plaintiff in error, *vs.* JOSEPH E. FRAZIER, et al., Defendants.	Error to the Supreme Court of Tennessee.

Motion for Award of Damages.

In this cause, Joseph E. Frazier and others, defendants, move the Court to award, in addition to interest upon the amount of their several judgments, decreed to be paid by the plaintiff in error, damages at a rate not exceeding ten per cent. thereof, because the writ of error delayed the proceedings on the decree of the Supreme Court of Tennessee, and appears to have been sued out merely for delay.

Wm. M. Baxter, Esq.,
Counsel for Plaintiff in error:—

The foregoing motion will be submitted to the Court on Monday, April 27th inst., under Rule XXIII.

HENRY H. INGERSOLL,
Counsel for Defendants.

Copy of the above received by me this 20th April, 1891.

WM. M. BAXTER.
Counsel for Plaintiff in error.

"In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding ten per cent., in addition to interest, *shall* be awarded upon the amount of the judgment."—Rule XXIII-2.

At a former day of the present term, this cause was submitted on motion to dismiss or affirm.

On March 23d, Mr. Justice Brewer delivered the opinion of the Court sustaining the motion to affirm, which contains the following succinct statement of the case, furnishing the ground for this motion.

"The pleadings in the trial court, the assignment of error, the opinion of the Supreme Court, and the original decree of that court, contain no reference to any Federal question. The invalidity of the act of 1877, in all these proceedings, is placed upon a supposed conflict with the State constitution. Obviously that was the substantial matter litigated. The fact that, two days after the decision, the presentation of a Federal question was recognized by the Supreme Court, is not to be taken as a declaration that the Federal question was a principal one—one which it had theretofore ignored—but rather implies that it was a subordinate and incidental matter, which, though noticed by counsel, was not made the stress of the argument or the burden of complaint. As such a claim had been made, although in a subordinate and incidental way, and although it was a matter which had not arrested its attention, that court, with a delicate sense of justice, caused a statement to be entered of the presentation of this Federal question, in order that any rights of review which the railway company might have by reason thereof, should not be lost to it. Recognizing the fact that thereby a Federal question is presented, it seems so obvious that it was not the bone of con-

tention, the principal matter litigated, but *only put into the record for the purpose of an appeal*, that it must be adjudged there was color for the motion to dismiss. While that motion must be denied, the motion to affirm is presented for consideration, and upon that we have no doubt."

Matter "not the bone of contention put into the record for the purpose of an appeal" makes the writ of error to "appear to have been sued out merely for delay." In such case "damages at a rate not exceeding ten per cent. *shall* be awarded."

If it be objected that the decision of the Court, affirming the decree of the State Court, was under the last clause of Rule VI, Sec. 5, viz: "That the question on which the jurisdiction depends is so *frivolous* as not to need further argument, the answer is found in the language of Chief Justice Waite in *Amory* vs. *Amory*, 1 Otto, 356:

"We can adjudge damages under Sec. 1010, R. S., and Rule 23, in all cases when it appears that a writ of error has been sued out for delay. This gives us the only power we have to prevent *frivolous* appeals and *frivolous* writs of error; and we deem it not improper to say that *this power will be exercised* without hesitation in all cases where we find that our jurisdiction has been invoked merely to gain them."

And in *Whitney* vs. *Cook*, 9 Otto. 607, the Court says:

"Our experience teaches that the only way to discourage *frivolous* appeals and writs of error is by the use of our power to award damages, and we think this a proper case in which to say that hereafter more attention will be given to that subject, and the *rule enforced both according to its letter and spirit.* Parties should not be subjected to the delay of proceedings for review in this court without reasonable cause; and our power to make compensation to some extent for loss occasioned by an unwarranted delay ought not to be overlooked."

See also *Prov. Ins. Co.* vs. *Hutchberger*, 12 Wall. 164.
Hall vs. *Jordon*, 19 Wall. 271.

Peyton vs. *Heineken*, (L. C. P. Co.) U. S. Rep. Book 20, page 680.

In short: A writ of error sued out on a question * * * "so frivolous as not to need further argument" is a "frivolous writ of error." And a "frivolous writ of error" is one "taken for delay only"—Rule 6,—or "sued out merely for delay,"—Rule 23.

The delay caused by this writ of error in this cause is for two years, viz: from September Term, 1889, Supreme Court of Tennessee, to September Term, 1891, same Court. Ten per cent. upon the various judgments embraced in the cause would not exceed "just damages," the allowance of which is required by Sec. 1010 Rev. Stat., nor the fair compensation to which defendants are entitled for the delay and additional expense of contesting their respective judgments in this Court.

This supplemental motion is analogous to that of a motion for award of damages upon an injunction bond. It comes appropriately after the decision of the cause has established the facts upon which the award and recovery depends.

And unless the Court has in fact already considered and decided the question presented by this motion it is submitted that under the terms of Rule XXIII: "*shall* be awarded," the declared purpose of the Court to enforce the same "in its letter and spirit," and the decision of the Court in this case that "the Federal question was put into the record for the purpose of an appeal," defendants are entitled to an award of damages at the rate of ten per cent. upon the amount of their several judgments delayed for two years by the writ of error in this cause.

HENRY H. INGERSOLL,
Counsel for Defendants.

Office Supreme Court U. S.
FILED.
APR 27 1891
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1890.

No. 1407.

EAST TENNESSEE, VIRGINIA & GEORGIA RAILWAY CO.,

PLAINTIFF IN ERROR,

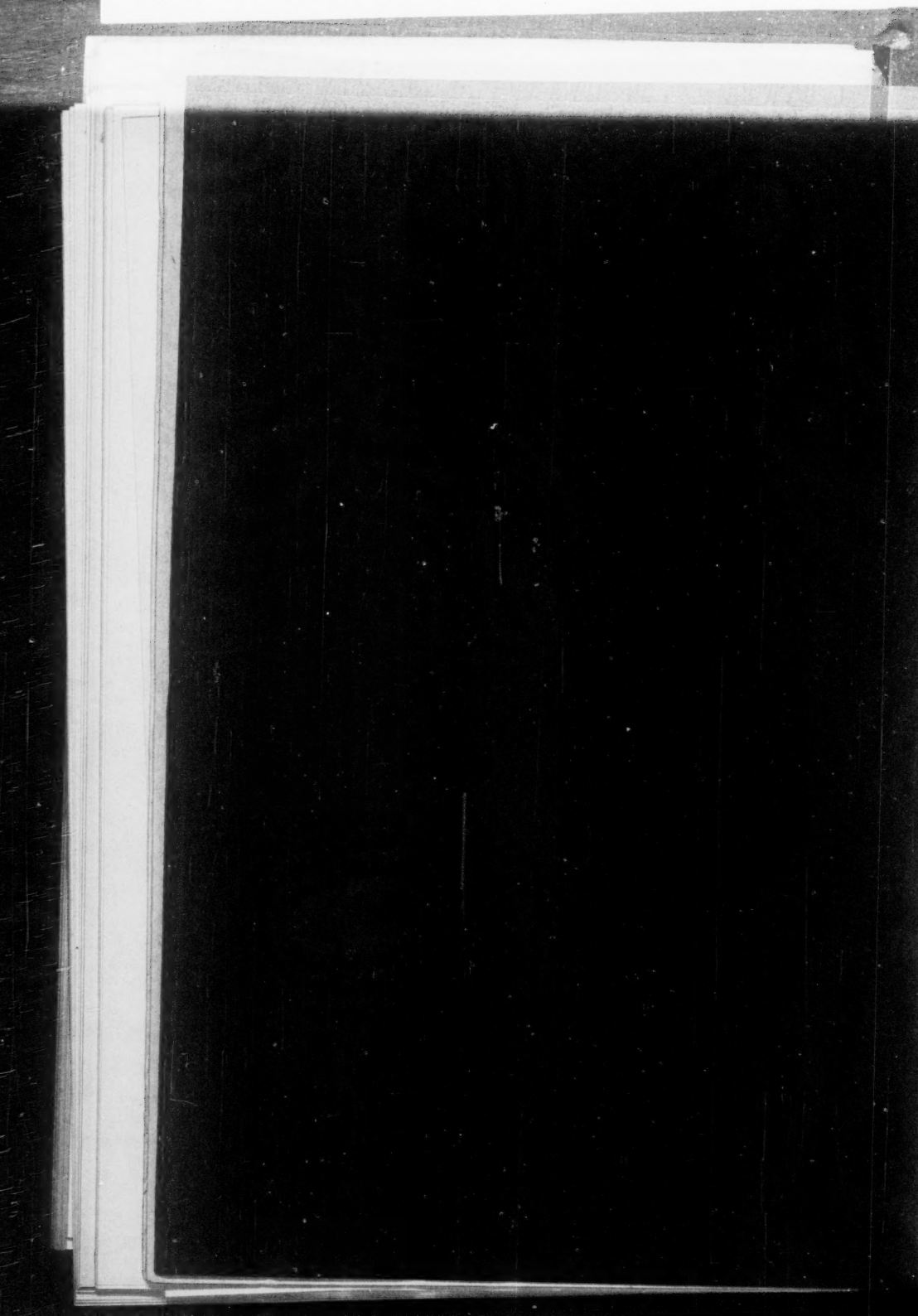
VS.

JOSEPH E. FRAZIER, *et al.*, DEFENDANTS.

Motion Under Rule 23.

BRIEF FOR APPELLANT.

WM. M. BAXTER, OF COUNSEL.



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BRIEF FOR APPELLANT

WM. M. BAXTER, OF COUNSEL.

KNOXVILLE, TENN.:
S. B. NEWMAN & CO., STEAM BOOK AND JOB PRINTERS.
1891.

IN THE

Supreme Court of the United States.

October Term, 1890.

East Tennessee, Virginia & Georgia Railway Company, Plaintiff in Error, *vs.* Joseph E. Frazier, *et al*, Defendants.	}	No. 1407.

In reply to the motion made herein, appellant submits that it ought not to be allowed:

(1) Because it does not appear, nor does the record show, that the writ was sued out merely for delay. There is intrinsic and incidental evidence in the record that every step in this litigation, and every incident of it, has been hotly contested. It is a fact shown by the records of the State and Federal Courts of Tennessee, which fact is well known to appellee's counsel, that the liability of the purchasers at the foreclosure sale of the property of the old East Tennessee, Virginia & Georgia RAILROAD Company, until the decision of this Court, has never been considered other than a very doubtful question.

In cases now pending on the docket of this Court, coming up from the Circuit Court of the United States for the Eastern District of Tennessee, the Circuit Judge and District Judge certified a difference of opinion on the merits of this very question; and the appeals in these cases are now pending for decision.

(2) Because the writ in this cause was sued out *bona fide*, and not merely for delay. This would be the presumption; and the burden would be upon the appellee to show to the contrary. The fact that this Court has affirmed the judgment of the State Court, does not, and cannot, *ex post facto*, make *mala fides* of *bona fides*.

(3) Because this Court, in equity cases, under Rule 23, does not, as a matter of course, apply damages, in addition to interest. It may order *otherwise*, and in this cause has already done so, in the judgment it has heretofore entered. That order only awards *interest* and *costs*.

(4) Because two things must concur in order to sustain such a motion as is herein made, to-wit: It must appear that the writ was taken merely for delay, and, even if this be shown, that the Court thinks it a case in which it should not order otherwise.

(5) It not only does not appear that the writ was taken for delay, but on the other hand the Court has already made an order simply for interest and costs. This saves appellees from any loss. They get principal, interest and costs. The imposition of a penalty in the way of damages, is to punish appellant for frivolous appeals, and appeals which, upon their face, are utterly without merit. It is only in the most extreme or most flagrant cases of an abuse of the appellate jurisdiction of this Court, that the rule was intended to be, or ever has been or ever should be, applied. If it followed that every case which this Court might dispose of, upon a motion to dismiss or affirm, carried with it, as a matter of course, ten per cent. damages, many an honest client would be deterred from seeking the opinion and protection of this Court, lest he should be punished for doing so.

It is respectfully submitted, and insisted, that it is now too late to make this motion, because the Court has already acted in the premises; but even were it in time, it ought not to be granted.

Respectfully submitted,

WM. M. BAXTER,

Solicitor for Appellant.

139-293
139-293

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1235.

THE WALTER A. WOOD MOWING AND REAPING MACHINE COMPANY, PLAINTIFF IN ERROR,

vs.

SMITH A. SKINNER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED AUGUST 9, 1890.

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1 In the Court of Appeals of the State of New York, Third Department.

SMITH A. SKINNER, Plaintiff, Respondent,
against
THE WALTER A. WOOD MOWING AND REAPING MACHINE COMPANY, Defendant, Appellant.

Return.

James Lansing, attorney for respondent.
Hale, Cowen & Bulkley, attorneys for appellant.

$\frac{7}{431}$.

Albany:
The Argus Company, printers.
1887.

Filed March 17th, 1888.

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the justices of supreme court of the State of New York, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said supreme court of the State of New York, before you or some one of you, on a remittitur from the court of appeals of the State of New York, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Smith A. Skinner and the Walter A. Wood Mowing & Reaping Machine Company, wherein was drawn in question the validity of a statute of or an authority exercised under the United States and the decision was against their validity, and wherein was drawn in question the validity of a statute of or an authority exercised under the State of New York on the ground of their being repugnant to the Constitution, treaties, or laws of the United States and the decision was in favor of their validity, and wherein was drawn in question the construction of a clause of the Constitution or of a statute or statutes of the United States and the decision was against the right, title, privilege, exemption, or immunity specially set up or claimed under such clause of said Constitution, statute, or statutes of the United States, a manifest error hath happened, to the great damage of the said Walter A. Wood Mowing & Reaping Machine Company, as by its complaint appears, we, being willing that error, if any hath happened, shall be duly corrected and full and speedy justice done to the parties aforesaid in

3 this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Mon-

day of October next, in the said Supreme Court to be then and there held, that, the record and proceedings being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 23d day of June, in the year of our Lord one thousand eight hundred and ninety.

[Seal of the U. S. Circuit Court, Northern District N. Y.]

W. S. DOOLITTLE,
Clerk of the Circuit Court of the United States
for the Northern District of New York.

Allowed June 21st, 1890, by—

DAVID L. TROLLETT,
Chief Judge Court of Appeals, Second Division.

4 [Endorsed:] Supreme Court of the United States. The Walter A. Wood Mowing & Reaping Machine Company, pl'ff in error, against Smith A. Skinner, def't in error. Original writ of error. Hale, Cowen & Bulkley, attorneys for pl'ff in error, 25 North Pearl street, Albany, N. Y. Due and personal service of cop- of the within — admitted this — day of ——, 18—. —— ——, attorney for —. Filed June 27, 1890.

5 Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the court of appeals, held at the capitol, in the city of Albany, on the 3rd day of June, in the year of our Lord one thousand eight hundred and ninety, before the judges of said court.

Witness the Hon. William C. Ruger, chief judge, presiding.

GORHAM PARKS, *Clerk.*

Remittitur June 10th, 1890.

6 SMITH A. SKINNER, Respondent,
ag'st
THE WALTER A. WOOD MOWING & REAPING MACHINE COMPANY, Appellant.

Be it remembered that on the 17th day of March, in the year of our Lord one thousand eight hundred and eighty-eight, The Walter A. Wood Mowing & Reaping Machine Company, the appellant in this action, came here into the court of appeals, by Hale, Cowen and Bulkley, Esqrs., its attorneys, and filed in the said court a notice of appeal and return thereto from the judgment of the general term of the supreme court of the State of New York, and Smith A. Skinner, the respondent in said action, afterwards appeared in said court of appeals, by James Lansing, Esq., his attorney.

7 Which said notice of appeal and the return thereto filed as aforesaid are hereunto annexed.

Whereupon the said court of appeals, having heard this cause argued by Mr. Esek Cowen, of counsel for the appellant, and by Mr. James Lansing, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the supreme court appealed from in this action be in all things affirmed; and it was further ordered and adjudged that the respondent recover against the appellant costs of appeal to this court.

And it was also further ordered that the record aforesaid and the proceedings in this court be remitted to the said supreme court, there to be proceeded upon according to law.

8 Therefore it is considered that the said judgment be in all things affirmed, with costs as aforesaid, and stand in full force, strength, and effect.

And hereupon, as well as the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid by them given in the premises, are by the said court of appeals remitted into the supreme court of the State of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said supreme court before the justices thereof, &c.

GORHAM PARKS,
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, *June 10th*, 1890.

Seal Court of Appeals, State of New York. I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

GORHAM PARKS, *Clerk.*

9 In the Supreme Court of the State of New York, Third Department.

SMITH A. SKINNER, Plaintiff, Respondent,
against
THE WALTER A. WOOD MOWING AND REAPING MACHINE COMPANY, Defendant, Appellant.

Case and Exceptions.

James Lansing, attorney for respondent; Hale, Cowen & Bulkley, attorneys for appellant.

Albany:
The Argus Company, printers.
1887.

10 In the Supreme Court of the State of New York.

SMITH A. SKINNER
against
THE WALTER A. WOOD MOWING AND REAPING MACHINE COMPANY.

The pleadings in this case are hereto annexed. The exhibits herein are at the end of the case.

This action was commenced by the service of a summons and complaint on or about the 26th day of July, 1883. The defendant served its answer on or about the 31st day of August, 1883. The case was duly referred, by order of the court, to Mr. A. V. De Witt, as sole referee, to hear and determine. It came on for hearing before the said referee on the 22d day of December, 1884, and the following proceedings were thereupon had:

Oath taken by referee before Fred. H. Mann, commissioner, Albany.

Hearing at office of Jas. Lansing, Esq., at Troy, December twenty-second, 10.30 a. m.

Plaintiff appears by James Lansing, Esq.

Defendant appears by John B. Gale, Esq.

Case opened by Mr. Lansing.

11 Plaintiff's counsel offers in evidence letters patent of United States, dated February 27, 1872, No. 124,092, to Smith A. Skinner for "improvement in oil-hole covers for journals." (Defendant objects as immaterial. Received in evidence, marked "A." See exhibit at end of case. Exception by defendant.)

Plaintiff's counsel also offers reissue, dated March, 1882, No. 10064, to plaintiff, marked "B." (Same objection, ruling, and exception.)

SMITH A. SKINNER, called and sworn for himself:

I am the plaintiff; I reside at Hoosick Falls; have for last twenty years; know Walter A. Wood, president of defendant; I am a physician by profession; also an inventor.

Q. To what extent?

A. I have patented ten or twelve different things, mostly on machinery—mostly on mechanical devices.

Q. Did you at and prior to 1872 and since have conversations with Mr. Wood in regard to his machinery and improvements on his machinery?

A. Yes.

Q. At one time you planned quite extensive improvements on his machinery?

(Waived.)

Q. Had you an interview in 1872 on the subject of this patented improvement with Mr. Wood?

A. Yes.

Q. State it.

A. It was in 1872. I was in Mr. Wood's library when the conversation came up in regard to oil-hole covers. He told me they were trying to get up a device for excluding the dust and gravel from the journals, and explained to me how they were trying to accomplish the object. I told him I didn't think it would work. He said to me, "You are something of an inventor; can't you invent something for this purpose?" I told him I would think about it. Next day I went to work and made a rough model and took it to Mr. Wood and showed it to him. He looked at it and said, "That is just what we want; that is the thing." He says, "You must get that patented," and referred me to Mr. Parsons to attend to it; told me to have the model made, which was made at their shop—the company's pattern shop. I saw Mr. Parsons. I think Mr. Parsons drew up the claim for a patent in the Patent Office.
12 He drew up the application for a patent; subsequently letters patent, Exhibit A, were granted.

Q. After this patent was issued, did the company use it?

A. The company used the device.

Q. What talk, if any, was had in regard to their use of it?

A. We had, Mr. Wood and myself had, conversation in regard to the use of it, at his library, soon after the patent was issued. The conversation was to the effect that the company was to use the device on their machines; they were to have exclusive use of it on their reapers and mowers; that I could dispose of it to other parties to use on other machines other than reapers and mowers. That was all the conversation. The company was then manufacturing mowers and reapers, not binders. They subsequently did manufacture binders and used this device on some.

Mr. GALE: Wait a moment, I'll object to that. (This last objected to as not covered by alleged agreement. Decision reserved.)

Q. Did you have other conversations?

A. Yes; the next conversation, as near as I can recollect, was in regard to what I should have for the royalty. I couldn't say where it was. I should think at his house. It must have been at his house. The only conversation was that Mr. Wood said I should have compensation from the company for the use of the device, but no agreement as to the amount at that time. We had various talks, and at the time Mr. Wood was going to Europe, before he went to Congress, and I think in 1878, I had another conversation. The conversation was that I should be paid for the use of the oiler, the use of the device, by the company. We never came to any agreement at that time. We had another conversation, pretty much the same thing, the time he went to Congress. Mr. Wood dropped me a note and said he wanted to see me. This was before he went to Congress. I went up to his house, saw him in the library. Then he says, "It is time we had this matter settled in regard to
13 the oiler." He said he wanted to settle up all his private affairs, and in regard to the oiler he then asked me how much royalty I thought I ought to have. I said, "Mr. Wood, I leave that to you entirely." He then says, "Would five cents on a

machine royalty be satisfactory?" I said that it would; I would leave it to him. He then said, "How many machines has it been used on?" I said, "I don't know anything about it, Mr. Wood." Then he wanted to know what year the patent was issued. I told him as near as I could recollect. He then reflected. Then said, "It will come to somewhere about five thousand dollars." He said in a pleasant way, "Well, Doctor, that comes to a pretty good sum, doesn't it?" I said yes. Then he says that he would have Mr. Parsons look over the books and see what it would amount to at five cents on a machine. That was all that occurred then in regard to the price. Then we talked about our private matters and in regard to the house—about money I owed him on a house. He says, "Here we, our company, have a mortgage on a certain house," indicating the house; it was either on Mr. Jas. Allen's house or Mr. Ball's house, I don't remember which. He proposed to give me the mortgage they held on that house and to pay me that way, and then he himself would take the mortgage from me in settlement of our private matters; nothing more done about it at that time. After this conversation in regard to the mortgage I received from Mr. Cheeney, the company's book-keeper, a note that Mr. Wood wanted to see me at his office over at the works—the company's office. I went. At that time we settled up our private affairs. I think it was that time. At that time Mr. Parsons sent in on a slip of paper the amount, the number of machines on which my device had been put, and what the same would amount to at five cents per machine. I saw the paper. It amounted to over seven thousand dollars at that time. I think that was all then about the company's matters. Now, about that time I think it was—(waived). The next conversation I had in regard to settling up this affair was with Mr. John Hobart Warren, one of the company's trustees. I went over to his house to see him and met him in his little office. I told him
14 I came to see him about settling that matter in regard to the oiler. He said it was time it was settled; he also thought I ought to have compensation. I asked him if he would see Mr. Wood and speak to him about it. He said he would; he said he advised me to go and see all the auditing committee individually, and I saw them all; they, every one I talked with, said that I ought to be paid, except Mr. Fuller; he said it ought to be settled.

Q. Have you, since the patent was issued to you and reissued, ever license l others to use it on mowers or reapers or binders or otherwise?

A. No; I never have.

Q. Have you had applications for its use?

A. Yes, sir.

Q. Any sum offered?

(Objected to by defendant as immaterial and, as evidence of value, incompetent.)

A. I was offered eight cents royalty.

(Here Mr. Gale objects as above. Answer waived and struck out.)

Adjourned to January fifteenth, 10.30.

OFFICE OF PLAINTIFF'S ATTORNEY,
January 15, 1885—10.30 a. m.

Parties appear as before.

Adjourned by consent to January twenty-fourth, 10.30 a m.

Adjourned by consent from January twenty-fourth to January twenty-eighth, 10.30 a. m., office of plaintiff's attorney.

OFFICE OF PLAINTIFF'S ATTORNEY, AT TROY,
January 28, 11.00 a. m.

Parties appear by counsel as before.

Plaintiff offers in evidence a printed circular of defendant of twenty-four octavo pages, issued in and for the year 1876, in which, at page fifteen, under the head of "Walter A. Wood's New Sweep Rake, Self-delivery Reaper," public attention is called to several enumerated "points of excellence," and amongst them the following: "The patent spring oilers are applied to all bearings." (Defendant objects to same as immaterial, and especially so far as any claim for use of such oilers during that year is barred by the statute of limitations. Objection overruled. Defendant excepts.)

Plaintiff offers in evidence like circulars for each year from 1877 to 1884, containing same statement. (Same objection and ruling and exception.)

Plaintiff offers to prove that the defendant used the device spoken of between the years 1872 and July, 1877, on 58,063 mowers and reapers. (Defendant objects as immaterial, and especially because all claim for such use is barred by the statute of limitations, and all right of action, therefore, is so barred.)

Parties admit that this action was commenced July, 1883.

Plaintiff offers to prove that the defendant used said device since July, 1877, and up to September, 1884, on 105,456 mowers, 39,479 sweep-rake reapers, 8,388 harvesters. (Defendant objects to such evidence upon these grounds: 1. That plaintiff has not proved any cause of action. 2. That the bargain testified to by plaintiff was only verbal, and was and is void by the statute of fraud. 3. That so far as such bargain was for an exclusive use of the device by defendant on their reapers and mowers, it was for an interest in plaintiff's then patent, and was void under the laws of the United States in that behalf, being only verbal. 4. That such bargain, as one for a sale, was for over fifty dollars, and void by the statute of frauds in such cases provided. 5. That such bargain, as one for the use by said defendant of said device for the term of said patent, was not to be performed within one year from the making thereof, and was thus void by the statute of such frauds in such case provided. 6. That as to so much of said proof as relates to machines made after March 21, 1882, such bargain was and is inapplicable, the patent in force when such bargain was made and to which the bargain related having been on said March 21, 1882, surrendered by plaintiff as void.)

Decision reserved.

Adjourned by consent to January thirtieth, 11 a. m.

16 JANUARY 30, 1885—11 a. m.

Parties appeared by counsel as before.

Defendant's counsel makes additional objection to the last offer as follows:

7. That as to the use of such device after March 21, 1882, it does not appear that the reissue was with the consent or knowledge of defendant, and it does appear from the original patent and reissue that the reissue was not for the invention claimed in the original patent, but that the reissue claim was broader than the original one, and that such reissue was therefore unauthorized and invalid. Plaintiff cites Pennyman *v.* Rotch (3 Metcalf, 216), on statute limitations; also 79 N Y., 1; Green *v.* Disbrow (19 Wend., 126). Decision reserved.

SMITH A. SKINNER recalled:

I had business dealings with the defendant before bringing this suit. (Paper shown to witnesss.) I received from defendant a bill I now have in my hand. I had with the defendant the transaction stated in this bill. (The bill offered in evidence by plaintiff. Defendant objects to same—1, as immaterial; 2, that the fact proven relates to the rendition by defendant of the entire bill, and that a part of such bill separately from the rest of it is inadmissible. Overruled. Defendant excepts. Bill received in evidence, marked "Plaintiff's C." See exhibit at end of case.) I never paid the items on the bill except the items May 22, 1876, of twenty-two dollars and eighty-two cents, and June 13, 1876, of seven dollars, which I paid July 18, 1876.

Cross-examined by Mr. GALE:

The various interviews with Mr. Wood related I have given, I think, with as much particularity as I now remember them.

Q. You have given only what seemed to be your recollec-
17 tion of the substance of those interviews, and is that all that at this distance of time you are able to give?

A. Yes, except where I have given language used.

Q. Did you at or about the time of either conversation make any memorandum of what was said?

A. No.

Q. In the instances where you have given language used would you be understood as remembering the words used or only their general purport?

A. Some of them, I should say, were the words used and others their purport.

Recess to three p. m.

WALTER A. WOOD called — sworn:

I am president of defendant. I have been since the company was formed, I think, in 1866. I have been engaged in the business of manufacturing mowing machines since 1852; have been some-

thing of an inventor; taken out patents—from ten to twenty—relating to harvesting machines. I know plaintiff; have since he came to Hoosick Falls, something like twenty years ago. The Doctor submitted to me a model of an oiler for journals. That was about 1871 or 1872. I had not at that time asked him to invent anything of that sort or to get up anything of that sort or to help me about it. When he showed me this model it was the first I knew he was doing anything about it. It was the first that I recollect having had any conversation with him about it. He showed me a device like that (producing an object.) (Defendant's counsel offers the object as an exhibit. Objected to by plaintiff as immaterial and incompetent, as being only the opinion of witness that the exhibit now shown is like the one then shown, and that, not being the instrument then shown, it is incompetent. Defendant estopped, etc. Further objection may be entered. Overruled. Plaintiff excepts. Object admitted. Defendant's No. 1.) In the device shown me by plaintiff there was a hole in the top plate or washer of the thickness of the washer.

Q. Did the company (defendant) ever use that device or one like it?

(Objected to; grounds to be stated.)

A. Never.

Q. What was the special objection to it?

A. It let the dust gather in the cavity on the washer and
18 fill, and then when the plug was pushed down to let the oil in the dust would be washed down. It is an impracticable thing to manufacture, the way the washer is held being removable by your fingers.

Q. What was done with respect to it?

A. I went to work and made an oiler like that (producing one).

(Defendant offers same in evidence. Objection—(1) not within issues made by the pleadings; (2) defendant estopped fron questioning plaintiff's patent or proving the invention joint, or that plaintiff was not sole original inventor. Objection overruled. Plaintiff excepts. Received in evidence. Defendant's No. 2.) All the oilers defendant has used have been like Exhibit No. 2. (Same objection, ruling, and exception.) In Exhibit No. 2 the washer is riveted in and not removable and the washer is countersunk so as to let the conical-shaped head of the plug come up into it far enough to project above the top and leave no place for dust to gather.

Q. Was that feature your contrivance?

(Objection—(1) not within the issues; (2) defendant estopped from showing patent invalid or plaintiff not original inventor, or that it was a joint invention. Overruled. Exception by plaintiff.)

A. It was.

Q. Have you heard read the plaintiff's statement of the first interview with you on this subject?

A. I have.

Q. Did you have any such interview with him?

A. No; not that I know of.

Q. Have you heard read the testimony of plaintiff as to his interview with you when he showed you the model?

A. Yes.

Q. Did you tell him that was just what you wanted—that was just the thing?

A. No; I didn't.

Q. Did you tell him that he must get that thing patented, as shown to you?

A. Oh, no; I don't remember ever telling him any such thing. I have heard read plaintiff's testimony as to such interview. I don't remember any such conversation as that with him.

Q. Did you ever have any talk with him about the company's having exclusive use of it and their reapers and mowers?

A. I had conversations with him on the subject of the company's use. I can't tell it just as it occurred. I can tell the substance of it. The Doctor wanted I should allow him something for the
19 use of it. He wanted the company should use it and pay him something for the use of it. I made him an offer for a shop right. I never proposed to take an exclusive license. I offered at that time. I had built the Doctor a house some time before that, and he wanted I should build him a barn. I didn't consider. The greatest interest I took was that the Doctor might make something out of it. I told him I would build him a stable as he told me he wanted, and as I had invented a part of it our use of it would give him some prestige in giving license to other parties. I told him I would give him the stable for a shop license. Such a stable would not cost over a hundred dollars. He didn't make much answer to it and it ended there. This was after the patent was taken out—within a year or two after tho patent was taken out, I should think. This was the first talk that I had with him, that I remember, on the subject of the company's use of it.

Q. Did you, at any time except as just now stated, make any arrangement with plaintiff about company's use of the oiler used by company?

A. No; not that I remember. I remember only two interviews after the patent was got out, the one I related and another—the other one. The Doctor came to see me about it. I couldn't give any idea of the time; may have been five, six, or seven years ago. All that I remember of that interview is that he asked me for the number of machines that I had built or used his oiler on. I referred him to Mr. Parsons—Mr. Russell Parsons. He does our patent business; have heard read plaintiff's testimony about interviews with me just before going to Congress. I had an interview with the Doctor; sent for him to see him on private business concerning the house that I had built for him, but I don't remember any conversation we had about the patent at that interview. The conversation was wholly about my private business.

Q. Did you ever propose to pay plaintiff five cents royalty on a machine for the oiler?

A. No.

Q. Or to give him for the company's use of it a mortgage which the company had against James Allen or Burt Ball or any one?

A. No; I never made but the one proposition, described before, about the stable.

20 Q. You remember of the Doctor's inquiring of you at any time about the number of the machines?

A. When I referred him to Mr. Parsons.

Q. Did you ever make to the plaintiff any promise as to the payment by the company for use of the device except as you have stated?

A. That is all.

Q. Did you ever have any talk with plaintiff on this subject of the company's paying him a royalty of five cents on a machine?

A. No.

Cross-examination:

I don't profess to remember all the conversations I had with the Doctor. I remember two. I may have had more. I couldn't say as to having others on the subject. I am the executive head of the institution there. I have charge of the improvements made on the machinery. Mr. Parsons has charge of the patent department. I couldn't tell you as to the time I referred the Doctor to Mr. Parsons about the number of machines. I don't know whether he furnished it to him—the number. I cannot tell him within three years the time I referred him to Mr. Parsons. I don't recall the conversation with the Doctor at the time, except what I have stated; that is all I remember. I didn't know of but one patent the Doctor had taken out; that was the one of 1872.

Q. Do you recollect of having some rubber device or cover for your oil well about the time this device was gotten up?

A. That rubber cover was my first experiment; it was a good oiler, but the oil would eat up the rubber. I don't recollect showing it to the Doctor. I suppose he saw it. He used to be around the works a good deal; very likely he saw me getting that up. I don't know. I don't remember any conversation with him about the rubber oiler; very likely I talked with him. The first model for the oiler, the Doctor's was like that (Defendant's Exhibit No. 1). I think it was of wood; it was rather a crude thing; it embraced all those features there.

Q. Upon reflection, don't you think that the first device you saw of the Doctor's was made of a brass cartridge drilled with a hole in the top, with a round-headed rivet, with a spring under the

21 head of it to spring up to close the hole?

A. No; I don't remember anything about a cartridge. I wouldn't testify that it was not of copper. The head of the rivet went against the hole, as in Defendant's Exhibit No. 1, but not into it. The drawing now shown me is not like the original device prepared by the plaintiff; it is like defendant's No. 2 (drawing, Plaintiff's Exhibit D). Mr. Parsons, I think, prepared the papers for the patent. The Doctor wanted it patented. I told him Parsons would

do it for him. I did not know of any earlier oiler patent obtained by the Doctor than that of 1872. The first use the company made of this device for an oiler was in the form of Defendant's No. 2. I am pretty familiar with the circulars issued by the company. (Page 5, circular 1878, shown witness:) I don't recollect whether I wrote the statement concerning the new inclosed gear mower or not. I know more or less about the circulars. I look them over. I hardly ever give any direction about them.

Q. Do you know, then, what this means in the circular of 1884: "Patent spring oilers are applied to all bearings"?

A. I don't know. I didn't know it was in the circular. My judgment would be that it refers to this Defendant's Exhibit No. 2. There is no other patent oiler besides this of the Doctor's, that I know of, that are used on our machines.

Q. You said you had an interview with plaintiff on your private business, but not relating to the patent oiler, as far as you recollected. Is your memory so good you can say positively about the oiler?

A. I can't say positively. All I can say is that I don't remember it. I recollect at one of our interviews something was said with reference to fixing five cents per machine as a proper price to be paid by Mr. Osborne for a license. I suggested Mr. Osborne's name to the Doctor as a proper person to go to and five cents as a suitable price.

Adjourned to February fourteenth, 11 a. m., office of plaintiff's attorney. Case held open by consent from February fourteenth to April thirtieth.

22

APRIL 30, 1885.

Parties appear by counsel as before, at office of James Lansing, Troy.

J. RUSSELL PARSONS, called for defendant, sworn by referee, testifies:

I am connected with the defendant in its employ, and have been on business connections with defendant during the whole period of its corporation. I have read the testimony in this case. At the time I knew of the company's use of one and another oiler.

Q. In the year 1871 state what kind of—whether there was a—what oiler was in use; whether the company had begun to use an oiler with rubber cap.

A. In the early part of the year 1871 there had been some experiments made at our factory by Mr. Wood in the way of an oiler.

Q. Describe same.

Objected to—(1) not within the issues; (2) invalidity not a defense; (3) defendant estopped from showing the patent invalid, or that the plaintiff was not the original inventor.

A. The cap portion, or that portion of the bearing which is above the shaft, or the journal of the shaft, to which the oil was to pass, was perforated, and in the perforation was placed a rubber plug which extended through the perforation; this plug was made of rubber and in the form of a rivet, with a conical head on the top of

the same; this head was made oval in shape at the top, and the main stem below the head of the plug was somewhat smaller than the perforation in the journal box, and the head of the rubber plug, being made oval in form, fitted against a recess in the cap bevelled out on its under side to fit the oval shape of the plug; this cap held the plug in place, and of course the elasticity of the rubber would close the opening in the cap whenever the machine was at work, and when it was desired to put oil upon the journal the operator places the end of his oil can on the top of this rubber plug, and pushing on it compressed the rubber and left an opening around it for oil to run in and find its way to the journal. As soon as the end of the oil can was removed the rubber plug, with its conical-
23 shaped head, would return to its place and exclude dust or any foreign substance from the bearing.

Q. With respect to the rubber plugs, whether any of them were applied to the company's machines?

(This class of questions is all taken subject to objection, and to motion to strike out on same ground.)

A. Yes, sir; I bought in the spring of 1871, of a rubber company of Bristol, R. I., 10,000 rubber plugs for use in the making of the oiler which I have described.

Q. State the difference in construction of the oiler you have described from Exhibit No. 2, being the one now in use by defendant.

(Objected to by plaintiff's counsel as above, and also upon the the ground that having described each of the devices and the testimony being before the referee—both are described in the testimony—that the difference is apparent from the proof already given. Objection overruled Plaintiff excepts.)

A. The difference is that in the oiler at present in use by the company a steel spring is used by which, when the oil-can point is placed on the head of the rivet, depressing the head of rivet, it is done by overcoming a spiral spring placed within the chamber, whereas in the device described by me a rivet made of rubber was used in place of an iron rivet with a spiral spring surrounding it and underneath the head.

Q. In the use of these rubber plugs was it found that the oil would injuriously affect the rubber plugs?

A. It was so found; it would eat it up in half an hour; the oil would destroy the rubber.

Q. Did you have any correspondence or conversation with Mr. Wood on the subject?

A. I had all the time correspondence, and conversations when I met him. I have a letter from him dated June 30, 1871, received probably the next day by me. I was in New York.

Defendant's counsel offers to prove that Mr. Wood by such letter wrote to witness as follows: "If you have done nothing about the rubber caps you may let the matter rest. Since I have found the effect of oil upon rubber I have been trying to make a different

thing, using a steel spring, which I think will answer as good a purpose."

24 (Objected to as hearsay and incompetent; also as immaterial, not relating to any of the issues Offered as bearing upon probabilities of the alleged agreement. Objection sustained. Defendant excepts.)

Q. Was the oiler with the rubber plug constructed on the journal cap in the same manner as this, Exhibit 2, is?

Waived.

Defendant offers in evidence from Webster's Dictionary, unabridged, published by G. & C. Merriam, Springfield, Mass., 1869, at page 909, what there appeared under and about the words "oil cup," consisting of a definition and two cuts, one a perspective view and the other a vertical cross-section, of an oil cup. (Objected to by plaintiff as, 1st, incompetent; 2nd, immaterial; 3d, not within the issues; 4th, the sole object of the proof being to show the want of novelty of the device, and therefore the invalidity of the patent for the use of which device this action was brought. Evidence insisted upon as material, as showing state of the art and the scope of the patent. Offer admitted. Plaintiff excepts.)

Defendant offers in evidence a copy of same, marked "Exhibit 3, Web. Dict." (See exhibit at end of case.)

Cross-examination:

Q. You say the rubber plugs didn't prove a success?

A. Yes; they were put upon our machines to a certain extent; think we sent out a few of them; we didn't continue their use.

Q. You had some conversation with Dr. Skinner and also with Mr. Wood in relation to this device?

A. Yes, sir.

Q. Do you recollect furnishing at one time, from books of the company, a statement of the number of machines upon which the device in question had been employed before this suit was brought?

A. Yes; I furnished it at Mr. Wood's request.

Q. What became of the statement?

A. I don't know.

Q. What did you do with it?

A. I think Mr. Wood's servant came to me with a note asking me to send word to him how many machines we had manufact-

25 ured with the device in question. I went to the books; made examination; sent word back on the same note to Mr. Wood. The number—I do not remember the number. I made a calculation as to what they would amount to at a particular price.

Q. What was the price per machine?

(Objected to as immaterial. Waived.)

Q. Was any price named in the note at which you should figure the amount?

A. Yes; five cents a machine.

1872.		
Nov. 30.	Wood, to school	1 00
	Load sawdust	1 00
1873.		
Nov. 14.	Wood, to school	50
1874.		
Jan. 17.	Sawdust	1 00
	Wood	1 50
	On chairs:	
	76 feet b. walnut, June, '71	7 60
	$10\frac{4}{10}$ days by Wright, June, '71	26 00
	$11\frac{5}{10}$ days by Wright, July, '71	28 75
May 15.	Wood	1 50
Oct. 7.	Sawdust	75
14.	Wood	1 50
Nov. 21.	740 lbs. carbon coal	5 00
1876.		
May 22.	Machine steel and duck, per bill	22 82
June 13.	Duck, per bill	7 00
10.	Wood	2 50
		$153 72

93 CONTRA.

June 30.	Services of two men hurt in shed	$11 00
July 18.	Cash for invoices, May 22, '76, and June 13, '76	29 82
	Balance	112 90
		$153 72

1876.		
July 18.	To balance	$112 90

94 At a general term of the supreme court, held at the city hall, in the city of Albany, on the 29th day of February, 1888. Present: Hon. J. S. Landon, presiding justice, and Hon. F. Fish and Hon. A. B. Parker, justices.

SMITH A. SKINNER, Pl'ff and Resp't,
vs.
THE WALTER A. WOOD MOWING AND REAPING MACHINE COMPANY, Def't and App'l't.

The appeal in the above-entitled action having been heard at this term:

Now, on motion of James Lansing, Esq., of counsel for the respondent, after hearing Esek Cowen, Esq., of counsel for the appellant, it is ordered that the judgment entered in this action in the office of the clerk of the county of Rensselaer on the 13th day of

July, 1887, be, and the same is hereby, in all things affirmed, with costs of said appeal to the respondent.

ROBERT H. MOORE, *Clerk.*

Copy.

ROBERT H. MOORE, *Clerk.*

Filed M'ch 2, 1888.
A true copy.
[L. S.] D. E. CONWAY, *Clerk.*

95 Supreme Court.

SMITH A. SKINNER, Plaintiff & Respondent,
vs.
THE WALTER A. WOOD MOWING AND REAPING MACHINE COMPANY, Defendant and Appellant.

The appeal taken by the defendant from the judgment entered in this action on the 13th day of July, 1887, in the office of the clerk of the county of Rensselaer having been brought to a hearing and heard at a general term of the supreme court, held at the city hall, in Albany, on the — day of November, 1887, and an order of said term having been made and entered affirming said judgment, with costs of said appeal to the respondent:

Now, on motion of James Lansing, Esq., attorney for the respondent, it is hereby adjudged that said judgment be, and the same is hereby, in all things affirmed, and that the respondent recover of the appellant, The Walter A. Wood Mowing & Reaping Machine Company, the sum of one hundred and seven and $\frac{68}{100}$ dollars, costs of said appeal.

D. E. CONWAY, *Clerk.*

96 *Notice of Appeal.—Code*, §§ 1300–'1.

103.

Supreme Court.

SMITH A. SKINNER, Plaintiff, Respondent,
against
THE WALTER A. WOOD MOWING & REAPING MACHINE COMPANY, Defendant, Appellant.

GENTLEMEN: Take notice that the defendant, appellant, above named hereby appeals to the court of appeals of the State of New York from the judgment of the supreme court herein entered in the clerk's office of the county of Rensselaer on the 2nd day of March, 1888, & from the whole thereof.

Dated March 16th, 1888.

Yours, &c., HALE, COWEN & BULKLEY,
Attorneys for the Def't, App'l't.

To the clerk of the county of Rensselaer and to James Lansing, attorney for the pl'ff, resp'd't.

97 [Endorsed:] Supreme court. Smith A. Skinner, pl'ff, resp'd't, against The Walter A. Wood Mowing & Reaping Machine Company, def't, app'l't. Notice of appeal. Hale, Cowen & Bulkley, appellant's attorneys. Filed —— —, 18—.

98 STATE OF NEW YORK,
City of Troy, County of Rensselaer.

CLERK'S OFFICE.

I hereby certify that I have compared the annexed copy, case on appeal, notice of appeal, and judgment-rolls, with the originals thereof, filed in this office, and that the same is a correct transcript therefrom and of the whole of said original.

In testimony whereof I have hereunto
Seal Rensselaer County. set my hand and affixed my official seal this 16 day of March, 1888.

D. E. CONWAY, *Clerk.*

99 At a special term of the supreme court of the State of New York, held at the city hall, in the city of Albany, on the 17th day of June, 1890.

Present: Hon. W. L. Learned, justice.

SMITH A. SKINNER
against
THE WALTER A. WOOD MOWING & REAPING MACHINE COMPANY.

The Walter A. Wood Mowing & Reaping Machine Company, defendant in the above-entitled action, having appealed to the court of appeals from the judgment entered herein on the 2nd day of March, 1888, and the court of appeals having affirmed the said judgment with costs, now, on reading and filing the remittitur sent down by the court of appeals, and on motion of James Lansing, attorney for the plaintiff, it is ordered that the judgment of the court of appeals be, and the same hereby is, made the judgment of this court.

Enter in Rensselaer county.

Enter. W. M.

D. E. CONWAY,
Rens. Co. Clerk.

100 [Endorsed:] 8. Supreme court. Smith A. Skinner against The Walter A. Wood Mowing & Reaping Machine Company. Original. Order on remittitur. Hale, Cowen & Bulkley, attorneys for defendant, 25 North Pearl street, Albany, N. Y. Due and personal service of cop— of the within — admitted this — day of ——, 18—. ——— - —, attorney for —. Filed June 18, 1890.

101 Supreme Court.

SMITH A. SKINNER
against
THE WALTER A. WOOD MOWING & REAPING MACHINE COMPANY.

On the order entered herein on the 18th day of June, 1890, and

on the remittitur herein from the court of appeals directing that the judgment of the said court of appeals in favor of the plaintiff, Smith A. Skinner, be made the judgment of the supreme court, and for costs, and the said costs having been adjusted at the sum of one hundred & fifteen dollars and — cents, now, on motion of James Lansing, attorney for the plaintiff, it is ordered and adjudged that the said judgment of the court of appeals be, and the same is hereby, rendered in favor of the plaintiff, Smith A. Skinner, and against the defendant, The Walter A. Wood Mowing & Reaping Machine Company, for the sum of one hundred and fifteen dollars and — cents, costs and disbursements of the said appeal to the court of appeals.

D. E. CONWAY, *Clerk.*

102 [Endorsed:] 8. Supreme court. Smith A. Skinner against The Walter A. Wood Mowing & Reaping Machine Company. Original. Judgment. Hale, Cowen & Bulkley, attorneys for defendant, 25 North Pearl street, Albany, N. Y. Due and personal service of cop— of the within — admitted this — day of ——, 18—. —— ——, attorney for —. Filed June 18, 1890, at 9 h. a. m.

103 I hereby certify that there was no opinion written by the court of appeals on the affirmance by it of the judgment appealed from in the case of Smith A. Skinner against The Walter A. Wood Mowing & Reaping Machine Company.

DAVID L. FOLLETT,
Chief Judge of the Court of Appeals of the State of New York, Second Division.

104 [Endorsed:] Supreme court. Smith A. Skinner against The Walter A. Wood Mowing & Reaping Machine Company. Original. Certificate. Hale, Cowen & Bulkley, attorneys for defendant, 25 North Pearl street, Albany, N. Y. Due and personal service of cop— of the within — admitted this — day of ——, 18—. —— ——, attorney for —. Filed June 27, 1890.

105 Supreme Court of the United States.

THE WALTER A. WOOD MOWING AND REAPING MACHINE COMPANY, Plaintiff in Error, *vs.* SMITH A. SKINNER, Defendant in Error.	Of the October Term, in the Year 1890.

Afterwards, to wit, on the first Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the capitol, in the city of Washington, comes the said Walter A. Wood Mowing and Reaping Machine Company, by Esek Cowen, its attorney, and says that in the record and proceedings aforesaid there was manifest error in each and every of the following findings, rulings, and decisions, to wit:

First. That the claim of the patent upon which the plaintiff sought to recover royalties from the defendant and upon which

the judgment brought up by this writ of error is based was as follows:

"The combination of the conical-headed and scalloped spring plug C and the undercut plate or disk *e*, when arranged to operate as an oil-hole cover, as herein described and represented."

And the patent particularly set forth the scalloping of the conical head, the defect in the device improved upon, and how the
106 same was obviated by such scalloping; and the State courts erred in holding that the claim was not for a scalloped head, but was for the combination, with the other elements, of a conical head, whether the same was or was not scalloped.

Second. The referee found as a fact that the promise of the plaintiff in error was to pay the defendant in error such sum of money as the patented device was reasonably worth, and also found that if the claim of the patent was for nothing more than a scalloped conical head, in combination with the other elements mentioned in the claim, then the same was worthless, and the defendant in error ought not to recover; and the State courts erred in holding that because the claim was substantially for a conical head, in combination with the other elements named therein, whether said head was or was not scalloped, as described in the specification, the plaintiff in error was liable for more than nominal damages.

Third. That the State courts also erred in their conclusion that the plaintiff in error had actually used the invention of the defendant in error, it being found by the referee that the plaintiff in error had not used such device unless the claim of the patent was for a conical-headed spring plug, with or without scallops.

Fourth. That such erroneous findings and holdings upon the part of the State courts were upon an erroneous construction of the letters patent put in evidence by the defendant in error and to recover for the use of which the suit was brought, and such construction necessarily involved the legal effect of the patent laws
107 of the United States, and such error deprived the plaintiff in error of an immunity secured to him by such statutes.

And the said Walter A. Wood Mowing and Reaping Machine Company prays that the judgment aforesaid may be reversed, annulled, and altogether held for naught.

ESEK COWEN,
Attorney for Plaintiff in Error.

108 [Endorsed:] Supreme Court of the United States. The Walter A. Wood Mowing & Reaping Machine Company, pl'ff in error, against Smith A. Skinner, def't in error. Assignment of errors. Esek Cowen, attorney for pl'ff in error.

109 New York Supreme Court.

SMITH A. SKINNER
against
THE WALTER A. WOOD MOWING & REAPING MACHINE COMPANY.

The United States of America to Smith A. Skinner:

You are hereby cited and admonished to be and appear at a supreme court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the county of Rensselaer, wherein The Walter A. Wood Mowing & Reaping Machine Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment against the said plaintiff, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 21st day of June, in the year of our Lord one thousand eight hundred and ninety.

DAVID L. FOLLETT,
Chief Judge of the Court of Appeals of the State of New York, Second Division.

ESEK COWEN,
Attorney for Above-Named Defendant,
15 Wall Street, New York City, New York.

110 Due and timely notice of a citation of the above cause, of which the within is a copy, and signed by David L. Follett, chief judge of the court of appeals of the State of New York, second division, is hereby admitted this 27th day of June, 1890.

JAMES LANSING,
Attorney for Plaintiff.

111 [Endorsed:] New York supreme court. Smith A. Skinner against The Walter A. Wood Mowing & Reaping Machine Company. Original. Citation. Hale, Cowen & Bulkley, attorneys for defendant, 25 North Pearl street, Albany, N. Y. Due and personal service of cop— of the within — admitted this — day of ——, 18—. —— ——, attorney for —. Filed June 28, 1890.

112 Supreme Court of the United States.

SMITH A. SKINNER
against
THE WALTER A. WOOD MOWING AND REAPING MACHINE COMPANY.

Know all men by these presents that we, Walter A. Wood, of Hoosick Falls, in the county of Rensselaer and State of New York, and Willard Gay, of the city of Troy, in the county of Rensselaer and State of New York, are held and firmly bound unto Smith A. Skinner in the full and just sum of eighteen thousand dollars, current

money of the United States, to be paid to the said Smith A. Skinner, his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated the 18th day of June, 1890.

Whereas lately at a term of the supreme court in a suit pending in the said court between the above-named Smith A. Skinner, plaintiff, and The Walter A. Wood Mowing & Reaping Machine Company, defendant, and judgment was rendered against the said Walter A. Wood Mowing & Reaping Machine Company, and the said Walter A. Wood Mowing & Reaping Machine Company is about to apply for a writ of error to remove the said cause to the Supreme Court of the United States to reverse the judgment rendered
113 in the aforesaid suit by the court of appeals of the State of New York, the record of which has heretofore been remitted to and made the judgment of the supreme court of the State of New York, and for a citation directed to the said Smith A. Skinner, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of October next: Now, the condition of the above obligation is such that if the said Walter A. Wood Mowing and Reaping Machine Company shall well and truly prosecute its writ of error and answer all damages and costs if it shall fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

WALTER A. WOOD. [SEAL.]
WILLARD GAY. [SEAL.]

Sealed and delivered in presence of—
DANFORTH GEER,
Notary Public.

UNITED STATES OF AMERICA, } ss:
Northern District of New York, }

Walter A. Wood, being duly sworn, deposes and says that he is worth thirty-six thousand dollars over and above all liabilities and exemptions.

WALTER A. WOOD.

Sworn to before me this 18th day of June, 1890.

[Seal Danforth Geer, Notary Public, Hoosick Falls, N. Y.]

DANFORTH GEER,
Notary Public.

114 UNITED STATES OF AMERICA, } ss:
Northern District of New York, }

Willard Gay, being duly sworn, deposes and says that he is worth thirty-six thousand dollars over and above all liabilities and exemptions.

WILLARD GAY.

Sworn to before me this 18th day of June, 1890.

[Seal Danforth Geer, Notary Public, Hoosick Falls, N. Y.]

DANFORTH GEER,
Notary Public.

STATE OF NEW YORK, } ss:
County of Rensselaer, }

On this 18th day of June, 1890, before me personally appeared Walter A. Wood, to me known to be one of the persons described in and who executed the foregoing bond, and acknowledged that he executed the same.

DANFORTH GEER,
Notary Public.

STATE OF NEW YORK, } ss:
County of Rensselaer, }

On this 18th day of June, 1890, before me personally appeared Willard Gay, to me known to be one of the persons described in and who executed the foregoing bond, and acknowledged that he executed the same.

[Seal Danforth Geer, Notary Public, Hoosick Falls, N. Y.]

DANFORTH GEER,
Notary Public.

I approve of the above bond and of the responsibility and sufficiency of the sureties therein named.

June 21, 1890.

DAVID L. FOLLETT,
Chief Judge of the Court of Appeals of the State of New York, Second Division.

115 [Endorsed:] Supreme court. Smith A. Skinner against The Walter A. Wood Mowing & Reaping Machine Company. Original. Bond. Hale, Cowen & Bulkley, attorneys for defendant, 25 North Pearl street, Albany, N. Y. Due and personal service of cop— of the within — admitted this — day of ——, 18—. —— ——, attorney for —. Filed June 27, 1890.

116 Supreme Court.

SMITH A. SKINNER
against
THE WALTER A. WOOD MOWING & REAPING MACHINE CO. }

STATE OF NEW YORK, } ss:
County of Rensselaer, }

To the Supreme Court of the United States:

I, Daniel E. Conway, clerk of Rensselaer county, N. Y., & of the supreme court of the State of New York, in obedience to the

foregoing writ of error annexed hereto, do hereby certify that the annexed is a true & complete transcript of the record of this court, with copies of all papers and proceedings in the within-entitled action, filed and remaining of record in this court, & are hereby certified and sent to the United States Supreme Court, as in said writ directed.

Given under my hand and seal this 18th day of July, 1890.

[Seal Rensselaer County.]

D. E. CONWAY, *Clerk.*

[Endorsed:] Rec'd June 17, '90. W. N. Filed June 27, 1890.

Endorsed on cover: New York supreme court. No. 1235. The Walter A. Wood Mowing and Reaping Machine Company, plaintiff in error, *vs.* Smith A. Skinner. Filed August 9, 1890.

Supreme Court of the United States.

THE WALTER A. WOOD MOWING & REAPING MACHINE COMPANY, Plaintiff in Error,
vs.
SMITH A. SKINNER, Defendant in Error.

No. 1235.

It is hereby stipulated and agreed by and between the parties hereto that letters patent of the United States issued to Smith A. Skinner on the 27th day of February, 1872, and numbered 124,092, be added to and bound with the printed record in the Supreme Court in this matter, and that the clerk of the Supreme Court is hereby requested to make such addition and correction.

ESEK COWEN,
Counsel for Pl'ff in Error.
R. A. PARMENTER,
Counsel for Def't in Error.

124,092.

UNITED STATES PATENT OFFICE.

SMITH A. SKINNER, of Hoosick Falls, New York.

Improvement in Oil-Hole Covers for Journals.

Specification forming part of Letters Patent No. 124,092, dated February 27, 1872.

To all whom it may concern:

Be it known that I, Smith A. Skinner, of Hoosick Falls, in the county of Rensselaer, and State of New York, have invented certain new and useful improvements in oil-holes and their covers for oiling journals, &c.; and that the following is a full, clear, and exact description of the same, reference being had to the accompanying drawing making a part of this specification, in which—

(Here follows diagram.)

Figure 1 represents in perspective the oil-hole and cover, as applied to a box or bearing, so as to oil a shaft or journal supported therein. Fig. 2 represents a section through the same. Fig. 3 represents the upper end of the plug, which plays in the oil-hole, and closes its top or opening.

Spring plugs have heretofore been used in oil-holes for opening or closing the avenue through which the oil is allowed to flow from the oil-can to the shaft or journal to be oiled. But from their mode of construction there are several objections to them, which I have

devised means of obviating: first, they were not accessible enough; second, they would jam or stick in the oil passage; and, third, they would gather and allow dirt, grit, seeds, &c., to pass in through the oil-passage, and down to the shaft or journal-bearings. These objections I have entirely obviated; and my invention consists in a peculiarly shaped plug, which is free to move up and down in the oil-passage without binding, or getting out of position, which completely closes the opening to the oil-passage, and which so far from collecting and allowing dust, grit, &c., to enter the oil-hole, actually sheds it, or allows it to drop off, said plug having a convex instead of a concave top, and yet easily forced down by the nozzle of the oil-can to allow the oil to flow in.

To enable others skilled in the art to make and use my invention, I will proceed to describe the same with reference to the drawing.

A represents a box, bearing, or hub, in which a shaft or journal is supported and turns. On this box, bearing, or hub is an elevated portion, B, through which and through the box or hub A there is an opening extending to the bearing surface, to admit oil from the exterior to flow through. The elevated portion B has lugs, projections, or hooks *c c c*, connected to it, under which a notched plate, *e*, is held. Under the plate *e* a plug, C, is held, there being a coiled spring, *f*, around the shank of said plug to force it up against the under side of said plate, and against an opening in the plate which the head of the plug closes.

The head of the plug is made rounding or conical, and the under side of the plate *e* is dressed off so as to allow the head to fit up closely against it, and against the edges of the opening through it, and make a snug joint. The highest portion of the head projects through the opening in the plate *e*, and extends somewhat above said plate, and in the apex of the head there is a countersink or recess, *i*, in or on which the nozzle of the oil-can is placed, and by pressing upon said head it sinks and opens up the oil-way through which the oil from the can flowing over said head finds its way down to the shaft or journal bearing.

The head of the plug is scalloped at its edges, as seen in Fig. 3, so that the points *n* may bear against the walls of the chamber in which said plug works, to prevent it from skewing, twisting, or jamming therein, while the oil is free to flow through the scalloped openings *o o*.

By this construction of plug-head and plate *e*, it will be seen, on reference to Figs. 1 and 2, that all grit, dust, seeds, &c., that may drop on the plug-head will roll or drop off, so that when it is pressed down to disclose the oil-opening there will be no injurious material there to drop into said opening and mingle with the oil.

When the plate *e* is turned until its notches come opposite to the hooks or catches *c*, the spring *f* will raise up said plate and also the plug, and disconnect them from the hub, bearing, or box, when the whole interior of the oil-way is exposed, and may be readily cleansed or the parts repaired and replaced in a moment's time.

Having thus fully described my invention, what I claim is—

The combination of the conical-headed and scalloped spring-plug C, and the undercut plate or disk *e*, when arranged to operate as an oil-hole cover, as herein described and represented.

SMITH A. SKINNER.

Witnesses:

A. C. EDDY.
J. M. FRANKLIN.

[Endorsed:] Supreme Court U. S. 1890, October term. No. 1235. The Walter A. Wood Mowing & Reaping Machine Co., pl'ff in error, *vs.* Smith A. Skinner. Stipulation & addition to record.

[Stamped:] Office Supreme Court U. S. Filed Feb. 21, 1891. James H. McKenney, clerk.

SUPREME COURT. GENERAL TERM.

Third Department. Nov. Term. Before Landon, P. J.; Fish, Parker, JJ.

SMITH A. SKINNER, Resp't,
ag'st
THE WALTER A. WOOD MOWING & REAPING MACHINE COMPANY, App'l'ts.

The defendant desiring to obtain an improved device for an oil-well cover to be used on harvesting machines, which it was engaged in manufacturing, its president, Walter A. Wood, spoke to the plaintiff about it and asked him if he could not get up something that would answer the purpose. Plaintiff made a rough model and submitted it to Mr. Wood, who approved of it and said he must get it patented and referred him to Mr. Parsons, who had charge of defendant's patent department. Upon an application, drafted by Mr. Parsons, a patent was issued Nov. 7, 1871. Subsequently plaintiff prepared a new model, which was submitted to Mr. Wood, and upon an application by plaintiff, which was also drafted by Mr. Parsons, another patent was issued, dated Feb. 29, 1872. The referee finds as a fact "that soon after the issue of such letters patent the plaintiff and defendant entered into an agreement whereby it was agreed on the part of the plaintiff that the defendant should have the exclusive right of using the plaintiff's oiler on mowing and reaping machines, and should have the right, but not exclusive, to use it on other machines, and, on the part of the defendant, that it would use said oiler upon its mowing and reaping machines and would pay the plaintiff therefore the reasonable value of such use; that the defendant soon thereafter proceeded to make and apply to mowing & reaping machines manufactured by it a device exactly similar to plaintiff's oiler, except that in the plaintiff's oiler the periphery of the conical head of the spring plug was scalloped, while in the device made and applied to such machines by the defendant such periphery was circular and not scalloped," and "that the making and application of the oiler was done under and in pursuance of the license obtained from the plaintiff by virtue of such agreement."

Prior to any invention by the plaintiff an oiler was pictorially illustrated in a publication known as "Webster's Dictionary" and published in the year 1869, which oiler was substantially like that used by defendant.

It does not appear that either plaintiff or defendant was aware of the publication in Webster's Dictionary prior to the commencement of the action.

The defendant continuously for a number of years advertised to the world the attachment of a patent oiler used by it as one of the

advantages of its machines, its president testifying upon the trial that "there is no other patent oiler besides this of the Doctor's, that I know of, that are used on our machines."

After more than 120,000 machines had been manufactured containing the oiler used, the plaintiff and defendant had some conversation about the price to be paid per machine, and the learned referee in his opinion, after a careful discussion of the evidence upon the subject, arrives at the conclusion that the defendant's president suggested five cents per machine as proper compensation for the plaintiff, to which plaintiff assented.

The referee found that the use of such device was worth five cents per machine, and rendered judgment in favor of the plaintiff.

Mr. James Lansing, for respondent; Mr. Esek Cowen, for appellant.

PARKER, *J.*:

The validity of the patent was not questioned by the answer or upon the trial, and the counsel for the defendant, in his argument before this court, asserted that the defendant admits the validity of the patent, but denies using the invention.

The plaintiff then had a valid patent, which he had a right to use personally or sell to others the right to use it. The defendant, a large manufacturer of mowing and reaping machines, sought to secure the exclusive right of using it upon its machines for the purpose, among other things, of advertising, as it subsequently did, as one of the advantages of its machines over others, that "patent spring oilers are applied to all bearings."

Whatever then may have been the prior state of the art upon the subject of patent spring oilers, according to the rule laid down by the court of appeals in Marston *vs.* Sweet, 66 N. Y., 206, and 82 N. Y., 526, the plaintiff had something to sell. The defendant desired to buy, and they made an agreement, in and by which the referee finds that it was agreed on the part of the plaintiff that the defendant should have the exclusive right of using the plaintiff's oiler on mowing and reaping machines, and the right, but not exclusive, to use it on other machines, and upon the part of the defendant it was agreed that it would use said oiler upon its mowing and reaping machines, and would pay plaintiff therefor the reasonable value for such use.

A careful examination of the evidence leads me to the conclusion that the referee was fully justified in finding the agreement to have been as above set forth. It is not claimed that the plaintiff in any respect violated his part of the agreement, and plaintiff testifies that because of the agreement with defendant he refrained from selling the right to use the oiler to other parties. The plaintiff, in consideration of the promise, gave up all advantage he had obtained, and the defendant, by virtue of the agreement, enjoyed the exclusive monopoly. Here there was injury to one party and benefit to the other, either of which is sufficient to furnish a consideration

for a promise. (Maston *vs.* Sweet, 66 N. Y., 206–212.) Now, the agreement on the part of the defendant was that, in consideration of the right to the exclusive use, he would use it upon all mowing and reaping machines, and would pay plaintiff a reasonable value for such use. By the terms of the agreement it was not incumbent upon the plaintiff to show that the defendant did actually use it upon such machines. It was sufficient for him to show the number manufactured during the existence of the agreement. Neither can the defendant evade liability by proving that it did not use it, because his agreement was, in effect, that he would pay a reasonable value for its use upon all mowing and reaping machines manufactured, and it cannot now be permitted to escape payment, as provided by the agreement, by proof that without the knowledge of the plaintiff it omitted to place the attachment upon machines manufactured by it.

Proof of its failure to make use of the right of exclusive user, which, by virtue of the agreement, it actually enjoyed, constitutes no defence to the vendor's right to demand the compensation which defendant in effect stipulated should be the reasonable value of the patent for one machine multiplied by the number of machines manufactured during the pendency of the agreement.

The views thus expressed render it unnecessary to consider the question discussed by the referee, as whether or not the defendant did use plaintiff's device upon its machines.

The only remaining question is, What was the reasonable value for the use of the invention upon such machines? The referee has found it to be five cents per machine. The reasons for his finding are set forth at length in his opinion and justify his conclusion.

The judgment must be affirmed with costs.

Concur. J. S. L.
I concur.

FISH, *J.*

STATE OF NEW YORK, }
City of Troy, County of Rensselaer, } *ss:*

CLERK'S OFFICE.

I hereby certify that I have compared the annexed copy of the opinion of Mr. Justice Parker with the original thereof filed in this office, and that the same is a correct transcript therefrom and of the whole of said original, and that said opinion constitutes a part of the printed appeal book or return used in the court of appeals and forms a part of the record of the case in this office.

[L. S.] In testimony whereof I have hereunto set my hand and affixed my official seal this 21st day of November, 1890.

[Rensselaer County Seal.]

D. E. CONWAY, *Clerk.*

[Endorsed:] U. S. Supreme Court. The W. A. Wood Co., pl'ff in error, *vs.* Smith A. Skinner, def't in error. Certified copy opinion of gen. term, &c.

United States Supreme Court.

THE WALTER A. WOOD MOWING & REAPING MACHINE COMPANY, Pl'ff in Error,
ag'st
SMITH A. SKINNER, Def't in Error.
} Stipulation to Print.

It is hereby stipulated and agreed that the opinion of Mr. Justice Parker herein, delivered at the general term of the supreme court, in the State of New York, may be printed by the clerk of the U. S. Supreme Court and form part of the record herein before said U. S. Supreme Court and appear in the printed transcript of record herein as a part thereof.

November 15th, 1890.

ESEK COWEN,
Counsel for Pl'ff in Error.
R. A. PARMENTER,
Counsel for Def't in Error.

[Endorsed:] Supreme Court U. S. 1890, October term. No. 1235. The Walter A. Wood Mowing & Reaping Machine Co., pl'ff in error, *v.* Smith A. Skinner. Stipulation of counsel & addition to record.

[Stamped:] Office Supreme Court U. S. Filed Nov. 22, 1890. James H. McKenney, clerk.

Evening Post Job Printing House, N. Y.

Office Supreme Court U. S.
FILED,
FEB 28 1891
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

THE WALTER A. WOOD MOWING AND REAPING MACHINE COMPANY,
Plaintiff in Error,

AGAINST

SMITH A. SKINNER,
Defendant in Error.

Motion to Dismiss or Affirm.

Statement of Facts.

On the 27th day of February, 1872, the defendant in error obtained a patent for a "oil hole cover for journals," which was, as the specification shows, a very slight improvement on what had been done before in the same line.

The device consisted of an oil passage through the upper wall of the journal box, for conducting the oil to the journal, which passage contained a spring plug, that is, a plug with a head and shank, the shank being surrounded by a spiral spring, which held the head in place when the devise was not in use. This oil passage was closed at the top by a cover, with a central aperture, the cover being

"undercut" around the aperture, so as to fit the conical head of the plug.

The operation of the device was as follows: Ordinarily, when the oiler was not in use, the head of the spring plug was closely fitted to the aperture in the undercut cover by means of the spring surrounding the shank of the plug. When it was desired to oil the journal, the nozzle of the oil can was placed upon the head of the plug, so as to force it down, the spring yielding for that purpose, and then the oil was poured into the space between the head of the plug and the wall of the oil passage. After sufficient oil had been poured in, the nozzle of the oil can was removed, and the spring forced the head of the plug back into place again, closing the passage tightly and keeping out grit, dust, seeds, &c.

The specification of the patent admits that the oil passage was old, that a spring plug was old, that a cover with a central aperture, closed by a spring plug, was old, but appears to describe as new the conical head and undercut cover fitting each other, as described.

The patentee goes on to say that one great difficulty of the old construction was that the head of the spring plug being smooth on its edge, and yet small enough to leave a space between itself and the wall of the journal, for the passage of the oil, would jam or stick in the oil passage. And he says, on page 1, first column of the printed copy of the patent:

> "My invention consists in a peculiarly shaped plug, which is free to move up and down in the oil passage without binding, or getting out of position."

In his description of the construction, he says (second column, same page):

> "The head of the plug is scalloped at its edges, as seen in Fig. 3, so that the points *n*

> may bear against the walls of the chamber in which said plug works, to prevent it from skewing, twisting, or jamming therein, while the oil is free to flow through the scalloped openings, *o o*."

The single claim of the patent was as follows:

> "The combination of the conical-headed *and scalloped* spring-plug *C*, and the undercut plate or disk *e*, when arranged to operate as an oil-hole cover, as herein described and represented."

The real question in the case was, whether the claim was for any conical headed spring plug combined with an undercut plate forming the cover of the passage, or whether it was for a conical headed plug in which the head was also scalloped at the edges.

The state of the art prior to Skinner's invention was plainly represented by an oiler shown in Webster's Dictionary, an extract from which is found opposite page 64 of the record. That oiler contained the identical invention of Skinner, except the *scalloped head*, as will be plainly seen by a mere glance at the cut.

Soon after this patent was granted, a conversation took place between the defendant in error and the president of the plaintiff in error, in which it was agreed that the defendant in error should have the exclusive right to put the device on mowers and reapers, and was to pay to the patentee what the use of the invention was worth. The plaintiff in error, in fact, used an oiler exactly like the one described in the dictionary, and never did use a spring plug with a scalloped head. It was proved that the value of the device actually used by the defendant in error was five cents a machine. But the witnesses on both sides agreed, and the Referee found, that scalloping the edge of the conical head was a device of no value whatever, and that plug heads so

scalloped possessed no advantage over those not scalloped.

But the Referee construed the claim of the patent to be for the use of a conical headed spring plug, whether scalloped or not; and, as the plaintiff in error had used many thousands of the Webster Dictionary oilers, the present large judgment was the result.

POINTS FOR THE PLAINTIFF IN ERROR.

I.

It is conclusively shown by the record that the judgment below depended upon the construction, by the Referee, of the Letters Patent, which were the subject matter of the contract sued upon.

1. The IV. finding of the Referee (Record, p. 49, fol. 67) is as follows:

> "That the defendant soon thereafter proceeded and continued to make and apply to mowing and reaping machines manufactured by it, a device exactly similar to the plaintiff's oiler, except that in the plaintiff's oiler the periphery of the conical head of the spring plug was scalloped, while in the device made and applied to such machines by the defendant such periphery was circular and not scalloped. The latter device is hereinafter styled 'the defendant's oiler.'"

The V. finding of the Referee (Record, p. 49, fol. 67) as follows:

> "That the defendant's oiler was a mechanical equivalent for the plaintiff's oiler. It performed the same functions in substantially the same way."

The VI. finding of the Referee (Record, p. 49, fol. 68) is:

> "That prior to any invention by the plaintiff an oiler was pictorially illustrated and briefly described verbally in a printed publication known as 'Webster's Dictionary,' and published in the year 1869. The oiler as represented and described in the dictionary is substantially similar to the defendant's oiler. It is represented as fitted to perform the same functions and substantially in the same way."

The VII. finding of the Referee (Record, p. 49, fol. 68) is:

> "That the said making and application of defendant's oiler was so done under and in pursuance of the license obtained by it from the plaintiff by virtue of said agreement, and was a use of the plaintiff's oiler under such license."

The Referee's first conclusion of law (p. 50, fol. 68) is that the making and application of the oiler, made and applied by the defendant, to the machines manufactured by it, as aforesaid, was so done under the license obtained by it from the plaintiff by virtue of the agreement aforesaid, and was a use of the plaintiff's patented oiler.

So that it appears on the face of the Referee's report that he construed the patent contrary to the contention of the plaintiff in error, as covering the combination of a conical headed plug, with an undercut plate, whether the head was or was not scalloped, as described in the patent.

2. Here it may be said by defendant in error that whether the plaintiff in error used the patented device or not is immaterial, because it agreed to put it on its mowers and reapers, and that meant to put it on all that it made or sold.

To meet this view of the case, it will be necessary

to examine the requests to find of the defendant below.

The law of New York, at a trial by a Court or Referee, permits either party to make requests to find facts and conclusions of law, and requires the trial Court to dispose of such requests as a part of the report.

It will be remembered that the plaintiff in error was not to pay a definite sum, but what the use of the invention was actually worth. To find out what the invention was worth, it was first necessary for the Referee to find out what the invention was. He found that it was a combination of an undercut plate with a conical headed spring plug, whether the head was or was not scalloped, and that, as so construed, the use of the patent was worth five cents a machine. The defendant below contended that the patent was for a conical headed and scalloped spring plug, and that the only novelty was the scallops, and that such novelty was no advantage over a conical head without scallops, and was valueless, hence the plaintiff in error could, at most, recover only nominal damages.

The fifth request and finding are as follows (Record, p. 52, fol. 71):

> "That the plaintiff's device described in his patent was exactly similar to that shown in Webster's Dictionary as aforesaid, except that in the latter the periphery of the conical head was smooth, while in the plaintiff's device such periphery was scalloped. (I so find. A. V. DeWitt, Referee)."

The tenth request and finding (Record, p. 52, fol. 72) are:

> "That the defendant never did, in fact, use the conical headed and scalloped spring plug decribed and claimed in the plaintiff's patent. (I do so find. A. V. DeWitt, Referee)."

The seventh request and finding (Record, p. 52, fol. 72) are as follows:

> "That making the head of the spring plug with scallops was a devise that was immaterial, worthless, of no advantage to the operation of the oiler, and was of no value whatever."

As to this request the Referee said:

> "I find on this subject as follows: That making the head of the spring plug with scallops as contrasted with making it circular in periphery was a device that was immaterial and possessed no advantage superior to making it circular in periphery, and a plug head so scalloped was of no value whatever superior to a plug head of circular periphery. (A. V. DeWitt, Referee)."

The defendant below requested the Referee to find as conclusion of law (p. 53, fol. 72):

> "FIRST.—That the plaintiff's invention as described and claimed was for the combination of a spring plug that was scalloped as well as conical headed, with an undercut plate or disk forming the cover of the oil tube or chamber."

This request was declined.

> "SECOND.—That the use of a cover formed by an undercut plate, in combination with a plug that was conical headed, but not scalloped, was not a use of the plaintiff's invention."

The Referee declined to find this request.

> "THIRD.—That therefore the defendant has never actually used the plaintiff's invention."

This was also declined.

> "FOURTH.—That if the defendant, by its conduct or agreement, has precluded itself from

denying that it has used the plaintiff's invention or is liable to the same extent as if it had used such invention on its mowers and reapers, then it is only liable for what the use of such invention is reasonably worth."

This request the Referee found.

The sixth request was as follows :

"The measure of damages, then, cannot exceed the advantage which the defendants would have gained by using the scalloped plug in place of the plain conical-headed plug shown in Webster's Dictionary, or, in other words, in place of the plug they did actually use."

This request the Referee declined.

Taking the actual findings of fact and conclusions of law by the Referee, together with his answers to the different requests of the defendant below, it is plain that his position was this :

1. That whether the ground of the liability was the actual use of the plaintiff's invention, or that, by reason of this agreement, the defendant below was liable to the same extent, as if it had used such invention, the limit of recovery in either case was the reasonable value of the device.
2. That, if the invention was confined to a conical and scalloped-headed plug, and the improvement consisted merely in the addition of the scallops to the smooth head shown in the Webster's Dictionary device, it was not reasonably worth anything, being of no advantage as compared with the device shown in the Dictionary.
3. That the oiler used by the defendant, although exactly identical with the one found in the printed publication, long prior to the alleged invention of Skinner, was an equivalent for

Skinner's invention, because it produced the same effect in substantially the same way, and that the oiler used by the defendant below was a use of the plaintiff's invention.

4. That the use of the invention was worth five cents for each machine upon which it was employed.

It follows, of necessity, that the Referee must have held that the invention claimed in the patent was the combination of a conical-headed screw plug with an undercut plate, whether the head was or was not scalloped. For if he had construed the patent, according to the view of the defendant below, he must have held that the invention was absolutely worthless, else he would have contradicted his own findings of fact.

The Court will see by the opinion of the Referee at fols. 85 and 86, that he bases his decision upon two plain misconceptions of the law of patents.

First, that the claim, in this patent, was not to be limited or modified by the prior state of the art, and, second, that it is not permissible to construe a patent to be for so slight an improvement that it is unpatentable, because that would lead to the conclusion that the patent was invalid, which the Referee assumes cannot be so.

I do not discuss here the soundness of this reasoning. I advert to it merely to show that the judgment, rendered by the Referee, was based on a construction of a claim of the patent, adverse to the contention of the plaintiff in error.

II.

Where a State Court makes a decision, upon the construction or validity of a patent, contrary to the

contention of one of the parties in that Court, it decides a federal question, which may be reviewed by this Court upon writ of error.

1. I do not by any means contend that this is a case "arising under the patent laws," within the meaning of the statutes, conferring jurisdiction on the Circuit Courts.

This action could not, in the first instance, have been brought in the United States Court, because it is founded upon a contract to pay a sum of money for the use of the patent, and the pleadings do not show that either the construction or the validity of the patent would come in question upon the trial. The answer simply denied that the use of the invention by the defendant was worth ten cents a machine, so that the pleadings, upon their face, did not necessarily raise any question as to either the construction or validity of the patent. So that the action could probably not have been brought in a Federal Court, nor removed to a Federal Court, upon the pleadings. But I contend that, when a question as to the true construction of the claim of a patent arises upon the trial, and it is decided by the judge or referee, he necessarily passes upon the construction and effect of the statute, which declares that a patentee shall point out what portion of the device described by him is new, and distinguish it from that which is old.

2. I do not pretend that I am certain as to the jurisdiction of this Court in the present case. I desire to submit the question to the Court. I cannot find any decision, explicitly holding that this Court will review the decision of a State court, as to the construction or validity of a patent; but I do find cases where the existence of the jurisdiction has been impliedly asserted by this Court, and I find none holding the contrary doctrine.

In the case of *Albright* v. *Teas* (106 U. S., 613), on page 616, the Court say:

> "The appellants insist, however, * * * that the testimony developed a controversy on the question whether the goods which they manufactured under other patents owned by them were or were not infringements on his (the appellee's) patents; consequently, that questions of infringement and of the construction of the claims of his patents were necessarily involved in the case, and, therefore, it was one arising under the patent laws of the United States. We search the bill of complaint in vain to find any averments raising these questions. It makes no issue touching the construction of the patents granted the appellee, or their validity or their infringement. The only complaint made in the bill is that the appellants were fraudulently excluding the appellee from an inspection of their books of account, and refusing to pay him the sums due for royalties under his contract. And the prayer of the bill was for a discovery, an account of what was due the appellee under his contract, and a decree for the amount found to be due him. On the face of the bill, therefore, the case is not one arising under the patent laws of the United States."

This, it seems to me, is an implied assertion that, if upon the face of the pleadings it was clear that the construction, validity or infringement of the patent were to be drawn into the question, it would have been a case arising under the patent laws.

The Court further said, on page 618:

> "In fact, it does not appear that there is any dispute whatever between the parties in reference to the construction of the patents of the appellee. The controversy between them, as stated by the appellants themselves, is whether certain goods manufactured by them embody the invention covered by the appellee's patents. This does not necessarily involve a construction of the patents. Both parties may agree as to what the

> patented invention is, and yet disagree on the question whether the invention is employed in the manufacture of certain specified goods. The controversy between the parties in this case is clearly of the latter kind. The case cannot, therefore, be said to be one which grows out of the legislation of Congress. Neither party asserts any right, privilege, claim, protection or defense founded, in whole or in part, on any law of the United States."

It seems to me that this also is saying, by implication, that if the construction of the patent was plainly involved in litigation—for instance, if the Court, upon the trial, was called upon to decide between two conflicting theories as to the construction of the patent, and the beaten party took the proper exception to the decision, that it would be a case growing out of the legislation of Congress.

In the case of *Felix* v. *Scharnweber* (125 U. S., 54) the Court said, upon page 59 :

> "The question at issue was not of priority of invention, or of the validity or construction of any patent, but simply whether the reels made and sold by the defendant were such as, or substantially like, those mentioned in his contract with the plaintiff ; and in the instructions to the jury the plaintiff's right of recovery was carefully limited to such reels. The patent to Mason was introduced in evidence afterwards, and by the defendant himself, against the plaintiff's objection ; and no ruling upon the validity or the construction of either patent, or upon the legal effect of the evidence, was requested by the defendant or made by the Court."

The Court further said :

> "The petition, upon which the writ of error was allowed by the acting Chief Justice of the Supreme Court of Illinois does, indeed, represent that the patent to Mason was set up by the defendant and its validity assailed."

And the Court go on to argue that the certificate of the Judge cannot supply the place of evidence in the record, that a federal question was decided.

It seems to me that all this reasoning tends to show, that, if there had been a ruling by the Court upon the construction or validity of the patent, which was adverse to the appellant, and which was properly excepted to by him, there would have been a federal question in the case, which this Court could review.

I am very much strengthened in this view by the recent case of *St. Paul Plow Works v. Starling*, (127 U. S., 376).

In that case the Court held that where an action was brought in the United States Circuit Court to enforce a contract to pay royalties upon Letters Patent, and the answer denied both the validity of the patent and the infringment, the case was one which was appealable, under Section 699 of the Revised Statutes, permitting an appeal to this Court, without reference to the sum or value in dispute. The Court said that it was so appealable, because it came within the language of that section, permitting such an appeal in cases "touching patent rights." It said on page 378:

> "The present case was an action upon a contract, by which the plaintiff licensed the defendant to make and sell a patented article, and not a suit for infringing the plaintiff's patent. But the questions, whether that patent was valid, and whether it had been infringed, were put in issue by the pleadings and decided by the Circuit Court."

And it held that whether or not it was strictly a case arising under the patent laws, within the meaning of the statutes, giving jurisdiction to the Circuit Courts, it was appealable here, as a case touching patent rights.

If a case in which the validity or construction of a patent is in dispute, touches patent rights, it is because it involves rights derived from United States statutes, for they are the only sources of such rights.

When, therefore, such rights are passed upon by a State Court, the decision is reviewable here. If an erroneous decision, as to the validity or construction of a patent is against the plaintiff, he is deprived of a right given to him by a federal statute. If such decision is against the defendant, he is deprived of a defense or an "immunity," derived from the same source.

I claim therefore that, as, in this case, the judgment rendered by the Referee, for substantial damages, was solely and entirely based upon a particular construction of the claim of the patent, contrary to the contention of the plaintiff in error, and as the Referee, if he had agreed with the plaintiff in error as to the construction of the patent, would have been bound to find nominal damages only, here is a federal question, within the strictest meaning of the term, which can be reviewed by this Court.

The plaintiff in error, in this case, has been deprived of a defense or immunity, which he claimed, under a statute of the United States.

I perceive, on page 5 of the brief of the counsel for the defendant in error, a statement that the General Term of the Supreme Court, upon appeal from the decision of the Referee, held that the construction of the claim of the patent was not material to the decision of the case. The learned counsel for the defendant in error is under a grave misconception as to what the opinion of the General Term states. It has been added to this case by stipulation, and the Court will find no such doctrine stated in the opinion. The opinion does say, that, whatever may have been the prior state of the art, the plaintiff had something to sell; that nobody denies. The defendant below conceded that if it had used the invention

under a license from the plaintiff below, it could not deny the validity of the patent. Therefore, for all the purposes of this case, the plaintiff below had a valid patent, which he could sell; and, upon this point, the General Term was right. The General Term also said (and whether it was right or wrong is of no consequence here), not that the construction of the claim was immaterial, *but* that it was immaterial whether or not the defendant below had actually used the invention, as it was bound by its contract with the plaintiff below to use it on all its mowers and reapers. That is a very different thing from saying that the construction of the claim was immaterial.

Our position was and is, that from the findings of the Referee, it necessarily follows that if the claim was construed in one way, the defendant below would be liable for five cents a machine, whereas, if it was construed the other way, he would be liable only for nominal damages. There is nothing in the opinion of the General Term that contradicts this proposition. When they come to the question of damages they say: "The only remaining question is, what "was the reasonable value for the use of the "invention upon said machines? The Referee has "found it to be five cents per machine. The reasons "for his finding are set forth at length in his "opinion and justify his conclusion." The "reasons" why he found that the defendant below was liable for five cents a machine, were that the claim of the patent must be construed to cover the combination of an undercut plate or cover, with a conical headed spring plug, and that whether the plug was scalloped or not was immaterial. If the General Term agreed with his view as to the value, for the reasons that he gave, they must have agreed with him in his construction of the claim.

III.

I find nothing else in the extended brief of the counsel for the defendant in error, upon this motion, which seems to require discussion.

The position is taken that there were other grounds upon which the State Courts might have decided the case. But, if the record shows, that, in order to reach the conclusion, that the defendant was liable for substantial damages, the Referee must have construed the claim of the patent contrary to the contention of the defendant below, that he did so construe it, contrary to the express request of the defendant below, and that, if he had not so construed it, he would have been bound, by his own findings of fact, to render a report for nominal damages only; and, if that decision of the Referee has been affirmed by the Court of Appeals, it matters very little that there were other considerations, upon which the State Courts *might* have decided the case, but did not do so. They might possibly have held that the plaintiff in error was liable upon other grounds, but they could not have held that it was liable for more than nominal damages, except upon the Referee's construction of the patent.

The only question, upon this motion, as I have endeavored to show, is the question whether or not, the party who relies, in the State Court, upon the invalidity or construction of a United States patent, and is subjected to an adverse decision upon those points, is deprived of a right or "immunity," secured to him by a statute of the United States.

I contend that, on principle, he is so deprived, and that the tendency of the recent decisions in this Court is to support that position.

ESEK. COWEN,
Of Counsel for Plaintiff in Error.

Office Supreme Court U. S.
FILED
MAR 2 1891
JAMES H. McKENNEY
Clerk

IN THE

SUPREME COURT

OF THE

UNITED STATES.

THE WALTER A. WOOD MOWING AND REAPING MACHINE COMPANY,
Plaintiff in Error,
against
SMITH A. SKINNER,
Defendant in Error.

NOTICE OF MOTION.

Please take notice that the defendant in error will move this Court at a term thereof to be held at the Capitol in the city of Washington, D. C., upon Monday, the 23d day of February, 1891, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, that the writ of error herein be dismissed, on the ground that this Court has no jurisdiction to entertain said writ; or, if it shall appear that this court has jurisdiction, then, that the judgment be affirmed, for the reason that the writ was sued out for delay only, since the jurisdiction of this Court, if any, depends upon a question so frivolous as not to need further argument.

The specific grounds of the motion are as follows:

First—That the action herein is an action upon contract only, and does not necessarily involve the construction of the claim of letters patent described in the plaintiff in error's assignments of error, un-

der the patent laws of the United States, since the claim of the patent was involved, if at all, only *incidentally*, and the question is not sufficiently material to constitute a ground for the judgment.

Second—That there being one or more independent questions at issue in the case, either one of which was broad enough to sustain the judgment herein independently of any supposed federal questions this Court has not jurisdiction to entertain the writ to the state Court.

Third—The action herein having been brought by a patentee against an exclusive licensee for breach of contract in failing to pay royalties under said agreement the licensee is is foreclosed by its agreement from limiting or escaping the claim of the patent by proof concerning the prior state of the art, and, therefore, there was no question of the construction of the claim according to patent laws or federal question in the case.

Fourth—If it shall be held for any reason, that the Court has jurisdiction of the writ, then it is insisted that the ground upon which such jurisdiction rests is too frivolous for argument, and that the same was taken for delay.

And Finally, for such other and further relief as the grounds therefor appear in the case and the papers herein, and as shall seem just and equitable to this Court, and that said writ of error be dismissed with costs ; or, if retained, that judgment be affirmed with costs and damages.

Yours, etc.,
R. A. PARMENTER,
Attorney for Deft. in Error,
No. 1 Mutual Building,
TROY, N. Y.

To E. COWEN, Esq., *Attorney for Plaintiff in Error.*

SUPREME COURT

OF THE

UNITED STATES.

THE WALTER A. WOOD MOWING AND REAPING MACHINE COMPANY,
Plaintiff in Error,

against

SMITH A. SKINNER,
Defendant in Error.

Writ of Error to the Supreme Court of the State of New York.

Brief for Smith A. Skinner, Defendant in Error.

This is a motion to dismiss the Writ of Error directed to the Supreme Court of the State of New York, allowed June 21, 1890, removing this case to this court, upon the grounds: (1) That this court has no jurisdiction of case, or (2) If it shall appear that the court has jurisdiction that the writ was obtained for delay only, since the ground upon which it was issued is manifestly frivolous.

The writ was allowed upon the ground of an alleged erroneous construction by the State Courts of the letters patent, put in evidence by the defendant in error on the trial, (to recover for the use of which the action was brought) which it is alleged necessarily involved the patent laws of the United States, and that the decision was against the rights of the plaintiff in error, under such laws.

The specific grounds of error are alleged to be as follows:

(1) The *claim* of the patent upon which the plaintiff below sought to recover royalties from the defendant is in words as follows:

"The combination of the conical-headed and "scalloped spring plug C and the undercut plate or "disk *e*, when arranged to operate as an oil-hole "cover, as herein described and represented. And the patent having particularly set forth the *scalloping* of the conical head; and the defect in the device improved upon; and, how the same was obivated by such scalloping, the State Courts erred in holding that the claim was not for a scalloped head, but was for the combination with the other elements of a conical head, whether the same was or was not scalloped.

(2) That the referee having found as a fact that the promise of the plaintiff in error was to pay the defendant in error such sum of money as the use of the patented device was reasonably worth, and also found that if the claim of the patent was for nothing more than a scalloped conical head in combination with other elements mentioned in the claim then the claim was worthless and defendant in error ought not to recover; and the State Court erred in holding that because the claim was substantially for a conical head in combination with other elements named therein, whether said head was or was not scalloped as described in the specifications, the plaintiff in error was liable for more than nominal damages.

(3) That the state courts also erred in their conclusion that the plaintiff in error had actually used the invention of the defendant in error, it being found by the referee that the plaintiff in error has not used such device unless the claim of the patent

was for a conical-headed spring plug, with or without scallops (fols. 105, 108.)

STATEMENT OF FACTS.

This action was commenced on the 26th day of June, 1883, in the Supreme Court of the state of New York by service of summons and complaint on the plaintiff in error. The plaintiff in error appeared and joined issue by its answer the 31st day of August, 1883, and the action was shortly thereafter duly referred by order of said court to A. V. DeWitt, Esq., as a sole referee to hear and determine the issues therein. On the 26th June, 1887, the referee reported in favor of the plaintiff, defendant in error, (case fols. 66-69) for the sum of $13,717.43, and thereupon, July 13th, 1887, judgment was entered for said sum, together with costs, in the Supreme Court of said state (fol. 75.)

The action was brought for a breach of a contract upon the part of the plaintiff in error in refusing to account and pay according to the terms thereof, for the use of a certain patented invention, known as an improvement in oil-hole covers for journals, which is described in letters patent and the reissue thereof, numbered respectively, 124,092 and 10,064, referred to in said complaint (fol. 61, 62.)

The contract as appears from the complaint, and particularly as established by the evidence, presents two distinct grounds for recovery, which may be briefly stated as follows: (1) The plaintiff in error having stipulated for the exclusive use of the defendant in error's patented device and enjoyed the same and *agreed to apply* the device to its harvesting machines, is liable for the value of such use upon all the machines manufactured and sold by it, upon which it had agreed to apply the device, whether it had actually so applied it or not. (2.) The plaintiff in error having stipulated for the exclusive

use of the defendant in error's device upon its harvesting machines and having agreed to pay the value of such use and *having applied* the same to its said machines under said agreement, its failure to pay according to its terms constituted a cause of action (fols. 61, 62; 11 to 14.)

The value of the use in either case is five cents per machine.

The referee in his report finds the following facts:

"That soon after the issue of said letters patent, the "plaintiff (defendant in error) and defendant (plain- "tiff in error) entered into an agreement whereby it "was agreed on the part of the plaintiff (defendant "in error) that the defendant (plaintiff in error) "should have the exclusive right of using the plain- "tiff's (defendant in error's) oiler on mowing and "reaping machines, and should have the right, but "not exclusive, to use it on other machines; and "on the part of the defendant (plaintiff in error) "that it would use said oiler upon its mowing and "reaping machines, and would pay the plaintiff "(defendant in error) therefor the reasonable value "of such use."

"That the defendant (plaintiff in error) soon there- "after proceeded and continued to make and apply "to mowing and reaping machines manufactured by "it, a device exactly similar to the plaintiff's (de- "fendant in error) oiler, except that in the plain- "tiff's (defendant in error's) oiler the periphery of "the conical head of the spring plug was scalloped, "while in the device made and applied to such ma- "chines by the defendant (plaintiff in error) said "periphery was circular and not scalloped."

"That the defendant's (plaintiff in error's) oiler "was a mechanical device equivalent for the plain- "tiff's (defendant in error's) oiler."

"That the making and application of the oiler

"used was done under and in pursuance of the li-
"cense obtained by it from plaintiff (defendant in
"error) by virtue of said agreement and was a use of
"plaintiff's (defendant in error's) oiler under such
"license (fols. 66, 69)."

"That the reasonable value of such use was five
"cents for each of the above mentioned machines
"upon which it was applied (fol. 68)."

The plaintiff in error contended upon the trial and on the argument upon the subsequent appeals, that it had not in fact used the plaintiff's (defendant in error's) device, but had used a similar one in all respects, except that the periphery of the conical-headed plug, which formed part of the combination, embraced in the defendant in error patent, was circular and not scalloped.

The General Term affirmed the judgment, and as appears by its opinion (last pages) which was necessarily part of the case, when it was examined by the New York Court of Appeals, see rule five of that Court, and is a part of the present record, (see stipulation of counsel, case last page), held that the *construction of the claim* of the patent in question was not material to the decision of the case, because the plaintiff in error having contracted for the exclusive use and promised to put the plaintiff's, (the defendant in error's) oiler upon all its machines, was liable for the value of the use of said device upon all the machines manufactured and sold by it during the existence of the agreement, whether it in fact used it or not. It also found the value of such use was five cents per machine for all machines manufactured and sold during existence of agreement.

The Court say: "Proof of its, plaintiff in error's
"failure to make use of its right of exclusive use,
"which by virtue of the agreement it had actually
"enjoyed, constituted no defense to the vendor's

"right to demand the compensation which defend-
"ant in effect stipulated should be the reasonable
"value of the patent for one machine, multiplied
"by the number of machines manufactured during
"the pendency of the agreement" (opinion, p. 3).
And the Court adds:

"The views thus expressed render it unnessary
"to consider the question discussed by the referee
"as to whether or not the defendant did use plain-
"tiff's device upon its machines."

Considerable testimony was given by the defendant in error upon the trial for the purpose of showing that, whether the plaintiff in error had used his invention or not, or assuming that it had not in fact, used his invention, it was estopped by its conduct and declarations from denying that the *device used by it* was the plaintiff's device. The facts found by the referee, or incontestably established upon the trial, support the defendant in error's contention.

It appeared that the plaintiff in error was a large manufacturing corporation, in fact one of the leading harvesting manufacturers in the world. That Walter A. Wood was its founder, and had been ever since its organization its president and "executive head" (fol. 17). That prior to 1871 the plaintiff in error had used upon the journals of its harvesting machines an antiquated device in common use upon rough machinery consisting of a hole in the box extending to the journal, said hole being enlarged at the surface with a cover, operated by a hinge, known as a "clapper oiler."

Mr. Wood who had the sole charge of the construction and improvements of the plaintiff in error's machines, was also in 1871–2 endeavoring to devise an oil hole cover which would be self-closing and unite ease of lubrication with entire exclusion

of dust and foreign substances from the journals of its harvesting machines. His experiment not proving successful Mr. Wood asked the plaintiff if he couldn't get up something that would answer the purpose. The defendant in error made a rough model, submitted it to Mr. Wood, who approved of it, and said "that is just what we want; that is the thing." He said the defendant in error "must "get it patented and referred him to Mr. Par- "sons, who had charge of plaintiff in er- "ror's patent department." "Upon an application drafted by Mr. Parsons," the "patent was issued November 7 1871." Subsequently the defendant in error made a new model for an improved oil hole cover which he submitted to Mr. Wood, who approved it and again "referred him to Mr. Parsons," and upon an application of defendant in error, which was also "drafted by Mr. Parsons," another patent was issued to him dated February 29th, 1872. It was concerning the use of the device made under this patent that the referee found the contract between parties was, as above stated. Shortly after such agreement and in pursuance thereof, as the referee finds, "the plaintiff in "error proceeded to make and to apply to its mow- "ing and reaping machines a device exactly similar "to the plaintiff's (defendant in error's) oiler, except "that in the plaintiff's (defendant in error's) oiler the "periphery of the conical head of the spring plug "was scalloped, while in the device made and ap- "plied to such machines by the defendant (plain- "tiff in error) such periphery was circular and not "scalloped."

The plaintiff claimed the device used by the defendant as within his patent (fols. 8, 29, 18, 19, 20.)

This was in effect at least, conceded by the plaintiff in error, for shortly after its adoption by the plaintiff in error, the company, through Mr. Wood,

commenced negotiation with the defendant in error "*for the use of the device used by it*" (fols. 18, 19, 20.)

The plaintiff in error also advertised the device to the world in connection with its machines as a patented device. Mr. Wood, when interrogated on the trial as to what patent spring oiler the defendant was advertising in its circulars, testified: "My judgment "would be that it referred to this defendant's ex-"hibit 2," and then added, "*there is no other pat-"ent oiler beside this of the Doctor's that I know of "that are used on our machines*" (fol. 21.)

At the time plaintiff in error stipulated for the use of the device and agreed to use it no specific price was agreed upon between the parties as a royalty for its use (fols. 12, 13, 14.)

Sometime subsequently, but what particular time does not distinctly appear, but presumptively about 1874, defendant in error called at Mr. Wood's house at his request to consult with him in regard to fixing the terms for the use of the oiler, and a conversation occurred of which the following is the substance: Mr. Wood said to plaintiff in error, that he or the company "wanted to settle with regard to the use of the oiler," and asked the defendant in error "how much royalty he thought he ought to have," and he replied, "he would leave it to Mr. Wood," who then asked, if "five cents on a machine royalty would be satisfactory," to which plaintiff in error replied, "it would." Wood then enquired "how many machines it had been used upon," also "when the patent was issued," and when plaintiff in error informed him as well as he was able. Mr. Wood then said in a pleasant way, "it will come to somewhere about $5,000." "He "then said he would have Mr. Parsons look over the "books and see what it would amount to at five cents "a machine." He also proposed to turn over to the

defendant in error a certain mortgage owned by the company in settlement for royalties (fols. 13, 14.)

The defendant in error called at the company's office at Mr. Wood's request shortly afterwards. At that time as defendant in error testified: "Mr. "Parsons sent in, on a slip of paper the amount, "the number of machines on which my device had "been put, and what the same would amount to at "five cents per machine. I saw the paper, it "amounted to over $7,000 at that time" (fol. 13.)

The testimony of defendant in error in regard to Mr. Wood being furnished at that time a statement of the number of machines upon which the defendant in error's oiler had been placed and what they amounted to at five cents a machine was fully corroborated by Mr. Parsons (fols. 24, 25).

The referee finds as a fact that the conversation took place as stated by defendant in error, and that it furnished satisfactory proof as to the value of the use of defendant in error's device (fols. 68, 89, 90).

Expert evidence was also offered by the defendant in error showing the value of the use of his device to be five cents per machine (fols. 49, 50, 51).

This proof was offered under stipulation in open court that the "defendant would offer no contradictory testimony upon the question of value if that sum was stated, and would not object to witness's competency to state the value" (fols. 51, 52).

Defendant's contention upon the trial for months after its commencement was limited to the defence, Statute of Limitations, Statute of Frauds, (fols. 15, 16, 17), and a denial upon the part of the plaintiff in error of making any contract for the exclusive use of the device as claimed by defendant in error (fols. 17, 18, 19, 20).

Nearly six months after the commencement of the trial and after numerous hearings had been had, and after the defendant in error had substantially closed his case, he learned for the first time through formal notice from the plaintiff in error that it would claim or insist that it had not used the defendant's device (fol. 28.)

It does not appear to have occurred to Mr. Wood or his counsel, when he gave his original testimony in the case, (fols. 17, 18, 19, 20, 21, &c.) that he had not been using plaintiff's (defendant in error's) device, on the contrary, he claimed that he helped the defendant in error, to perfect his device and negotiated with him for its use on plaintiff in error's machines (fols. 18, 19,) and that plaintiff in error was entitled to consideration upon that account (fols. 18, 19.)

The attention of the court is called so particularly to the foregoing details solely for the purpose of showing that the record contains an additional ground for recovery to that upon which either the Trial Court or the General Term, predicated its judgment, and which might well have been the ground upon which the Court of Appeals affirmed the judgment below. The judgment of the Supreme Court (General Term) was affirmed by the Court of Appeals without opinion.

A large amount of testimony was offered by the defendant in error upon the trial, to show that the device used by the plaintiff in error was identical with the device embraced in the defendant in error's patent, exhibit "A"; and that whatever difference appeared was the result of the use of mechanical equivalents (fols. 36, 48.)

POINT I.

Where an action is brought for a breach of contract in failing to pay royalties in accordance with the terms thereof; and nothing appears upon the face of the pleadings to show that the case is one arising under the patent laws of the United States; and where in ascertaining the sum due for royalties under the contract it becomes necessary incidentally to enquire whether the article manufactured or used, was manufactured or used under the patent, owned by the plaintiff (for which he is entitled to receive royalties) or, under some other patent, or without patent; this collateral inquiry does not change the nature of the litigation. "The suit, notwithstanding the collateral inquiry, still remains a suit on the contract to recover royalties, and not a suit upon letters patent, and this Court has no jurisdiction of the case."

Albright v. Teas, 106 U. S., 613, 617.
Wilson v. Sandford, 10 How., U .S., 99.
Harkell v. Tilghman, 99 U. S., 547.
Dale Tile Manufacturing Co. v. Hyatt, 125 U.S., 46, 52.

It is not necessary to amplify upon this point. The rule seems applicable to this case. The action herein is upon conract for the recovery of royalties. The complaint so states. The answer sets up the statute of limitations alone. Incidentally in the course of the trial in ascertaining the amount of royalties due, the question is raised as to whether the device manufactured and used by the plaintiff in error on its machines is the defendant in error's device, or within the defendant in error's patent, for the exclusive use of which the plaintiff in error has contracted. It is submitted that notwithstanding such incidental inqiury the suit is upon contract and not upon letters patent.

POINT II.

"It is well settled by a long current of adjudi-
"cations in this court under section 709 U.S. Revised
"Statutes, and the preceding statutes upon the sub-
"ject, that to give this court jurisdiction of a writ of
"error to the State Court it must appear affirmatively
"not only that a federal question was presented for
"decision to the highest court of the state having
"jurisdiction, but that its decision was necessary to
"the determination of the cause and that it was
"actually decided, or that the judgment as rendered
"could not have been given without deciding it."

DeSaussure v. Galliard, 127 U. S., 216, 234.
Brown v. Atwell, 92 U. S., 327.
Citizens' Bank v. Board of Liquidation, etc., 98 U. S., 140.
Chouteau v. Gibson, 111 U. S., 200.
Adams Co. v. B. & M. R. R., 112 U. S., 123.
Detroit City Railway v. Gathard, 114 U. S., 133.
New Orleans W. W. Co. v. La. Sugar Refining Co., 125 U. S., 18.

(*a*) It is also well settled that it is not sufficient that a federal question might have arisen or been applicable to the case, unless it is further shown on the record or by certificate that it did arise and was applied by the State Court in the case.

Coonrad v. Randall, 10 Pet., 368, 389.
Johnson v. Risk, 137 U. S. 300, 309.

(*b*) Nor will this Court entertain jurisdiction if it appears that beside the federal question decided by the State Court there is another and distinct ground on which the judgment or decree can be sustained and which is sufficient to support it.

Murdock v. Memphis, 20 Wall. 590, 636.,
Kennebec R. R. Co. v. Portland R. R. Co., 14 id., 23.
Jenkins v. Loewenthal, 110 U. S., 222.
Brooks v. Missouri, 124 U. S., 400.
Hopkins v. Mc. Lure, 133 U.S. 380
Blount v. Walker, 134 id. 607.
Beatty v. Benton. 135 id. 244.

(*c*) Where there is a federal question involved and an independent ground, and it appears that the State Court did base its judgment upon the independent ground, this court will not take jurisdiction of the case, even though it might think the position of the State Court an unsound one.

Klinger v. Missouri, 13 Wall., 257-263.
De Saussure v. Galliard, supra.
Crossley v. New Orleans, 108 U. S., 105.

(*d*) And the opinion of the State Court may be consulted to ascertain what questions were passed upon by the State Court.

Philadelphia Fire Association v. New York, 119 U. S., 110, 116.
McManus v. Sullivan, 91 U. S., 578.
Bolling v. Lersner, 91 U. S., 594.

(*e*) If there are two grounds for decision, one federal and the other non-federal, the Court will presume that it was decided on a non-federal ground.

Phœnix Insurance Company v. Treasurer, 11 Wall., 204.
Commercial Bank v. Rochester, 15 id., 639.
Mills v. Brown, 16 Pet., 525.

Except in the single instance where the independent ground is untenable and insufficient in law to support the judgment, in which case this Court will presume it was decided upon the federal ground.

Klinger v. Missouri, supra.

POINT III.

Applying the foregoing principles to the facts of this case it is manifest that this Court has no jurisdiction to entertain this writ.

Let it be assumed for the sake of the argument that the case brought hither by the writ of error is not covered by the doctrine of our first point, and that there was legitimately for investigation in this case the construction of letters patent within the patent laws of the United States, and the construction was adverse to the rights of plaintiff in error. There still remain two grounds (which appear in records in this Court,) either of which is sufficient to support the judgment of both of which the State Courts alone have cognizance, which are as follows:

First—The ground upon which the decision of the General Term of the Supreme Court of the state of New York rested its decision, namely, the breach of the contract by plaintiff in error in failing to pay for the use of the defendant in error's device, after having agreed to apply it to its harvesting machines and after having stipulated for, and enjoyed the exclusive use.

Second—Upon the ground which is fully sustained by the evidence in the case, that the plaintiff in error was estopped by its acts and declarations from proving that the device used by it was not within the defendant in error's letters patent.

(1) It is well settled in the practice of the state of New York that the decision of the referee, or the judgment in the Trial Court may be sustained upon any ground which appears in the case, and which is consistent with the pleadings; and even where a ground for recovery is established which is not within the pleadings, if the evidence is received without objections, the pleadings may after judgment be amended or considered amended by the General Term or even by the Court of Appeals to conform to the proof.

Clemons v. Davis, 4 Hun, 260.
Bowdan v. Colman, 6 Duer., 182.
Pratt v. H. R. R. R., 21 N. Y., 305, 314.
Bate v. Graham, 11 N. Y., 237.
Foot v. Roberts, 7 Rob., 17.

In this case the decision of the Trial Court and of the General Term apparently proceeded to a certain extent, at least, upon different grounds. The Trial Court held that the plaintiff in error had not only agreed to use the defendant in error's device upon all of its machines, but that it had, in fact, done so; holding in terms that the device used by the plaintiff in error upon its machines, was the defendant in error's device or its mechanical equivalent, and that it had used the same in pursuance of its license and agreement. The decision of the General Terms, on the other hand, proceeded upon the ground above stated that the defendantin error might recover upon the plaintiff in error's agreement to use the device under its exclusive license which it had enjoyed, consequently it was immaterial to enquire whether or not the plaintiff in error did in fact use defendant's in error device upon its machines. Thus by its decision it expressly eliminates even the semblance of the alleged federal question from the case.

(2.) Upon what ground the Court of Appeals proceeded in its decision does not appear, for it rendered no opinion. But it clearly had a right under the law and practice of the state of New York to proceed upon either ground stated by the courts below, or even to proceed upon an independent ground which satisfactorily appeared in the evidence.

Scott v. Morgan, 94 N. Y., 508.
People v. Supervisors, 70 N. Y., 228.
Allard v. Greasart, 61 N. Y., 1, 4.
Simar v. Canaday, 53 N. Y., 298.

We shall subsequently show there is abundant ground for the inference that the Court of Appeals might and actually did sustain the judgment upon a ground independent and entirely distinct from those which the court below proceeded, namely, upon the ground of estoppel.

But it is sufficient for our present purpose that it appears (in the record) that there are two distinct grounds, upon either of which this judgment might have rested, and, indeed, *was rested* in the State Courts, one of which it will not be claimed involved in the slightest degree a federal question.

(3) It follows that this Court must dismiss this writ.

First—Because in order to sustain it, it must distinctly and affirmatively appear from the record that the decision of the highest court could not have been made without passing upon the alleged federal question which it is impossible to show in this case.

Second—Where there are two grounds for the decision, one federal and the other independent, the Court will presume that it was decided upon the independent ground.

If this be the law, as there seems no reason to doubt, for there are a multitude of decisions in support of the propositions, this writ must be dismissed for the reason that there is a concededly single independent, non-federal question in this case broad enough to sustain the judgment of the State Court.

(*a*) We have not overlooked the single qualification of the rule in regard to presumptions, namely, that the independent ground must be tenable in law or at least not absolutely untenable in order to warrant the conclusive presumption by this Court that the case was not decided upon the federal ground.

We shall not stop to argue that the ground upon which the General Term placed its decision was sound in law or broad enough to sustain the judgment. The reasons for the decision of that court are so well stated and so thoroughly fortified in reason and by authority in the opinion of that

court prepared by Mr. Justice Parker (now in the Court of Appeals) and concurred in by the entire court that nothing remains to be said.

Counsel for the plaintiff in error in the State Court while substantially conceding the soundness ground of the decision of the General Term (which excluded from consideration the construction of the patent) insisted that the *vice* of the decision consisted in the assumption by that Court which plaintiff in error's counsel insisted was made, namely: "That damages for refusal to apply the device "were exactly equal to the agreed compensation for "actually using it."

To this objection, the obvious answer is that the recovery which the General Term found was authorized, was not predicated upon the refusal of the plaintiff in error to use the device, on the contrary was predicated upon its agreement to pay after having enjoyed "the exclusive use" of it.

Of course the General Term after holding that the cause of action consisted of the breach of the plaintiff in error's agreement to pay for the exclusive use of the defendant in error's patented device, encountered the question of the value of such use since it was claimed that the value of the use of the device had not been fixed by agreement, (and the device had not been used, according to its assumption, by the plaintiff in error, or anybody else, so far as appears).

But fortunately for the defendant in error, the plaintiff in error stipulated that expert evidence, or the testimony of an expert might be given as to the value of the use of plaintiff's device upon harvesting machines (case, fols. 28, 29, 52, 53.) See also testimony of Mr. Wood (fol. 21.) And it was shown that the value was five cents per machine. But the testimony of experts was compe-

tent without stipulation under the circumstances of this case.

McKeever vs. U. S., 23 Official Gazette, 1237.
Walker on Patents, Sec. 563-4.

POINT IV.

But there is another independent ground upon which, as stated above, the Court of Appeals might well have placed or rested its decision; one that was argued and greatly relied upon below by the defendant in error, which is that plaintiff in error having admitted the device used by it to be within the defendant in error's patent, is bound by such admission.

In other words, it is insisted that the plaintiff-in-error has by its conduct and declarations estopped itself from denying that the device used by it is the defendant-in-error's device.

The rule of law invoked is, that where one party has, by his conduct or declarations induced or permitted another to assume a position or act in reliance thereon, he cannot subsequently change his position or recall his statement where it would be inequitable or against good conscience to do so.

The essentials of this doctrine are:

(1) Statements made or attitude assumed by one with the intent that another shall act thereon.

(2) Action by such other party in reliance thereon.

(3) Injury to the party so acting or relying in case the other party is permitted to recall his statement or change his position.

The following cases illustrate the doctrine in its various phases:

Dezell v. Odell, 3 Hill, 219.
Richard v. Sears, 33 E. C. Law, 115.
Kingsley v. Vernon, 4 Sand., 361.
Continental National v. National Bank, 50 N. Y., 575.
Voorhees v. Olmstead, 66 N. Y., 113.

(*a*) It is immaterial whether the representation made be a statement of fact or a conclusion of law, or of an opinion concerning a fact, provided it was made to be acted upon, and was acted upon.

Tilton v. Nelson, 27 Barb., 595.
Mattoon v. Young, 2 Hun, 559.
DeHerques v. Marti, 85 N. Y., 609.
Morss v. Osborn, 64 Barb., 543.
Hickey v. Morrell, 102 N. Y., 454.
Petrie v. Feeter, 21 Wend., 172.
Stores v. Barber, 6 J. Ch. R., 166.

(*b*) The fact that both parties have the same opportunity to know, is not material; as, where there is room for two constructions of an instrument, and one party makes a particular construction and induces the other party to act upon it, he is thereafter bound by his construction, though it was made to his injury and in ignorance of the true legal construction.

Mattoon v Young, supra.

(*c*) Upon the question of injury, it is sufficient to show that the defendant in error has changed his position or refrained from the usual means of securing himself against loss; or that plaintiff in error has obtained an advantage by reason of such representations, or that the defendant in error's reliance thereon has been to his injury or disadvantage.

Continental Bank v. National Bank, supra.
Voorhees v. Olmstead, supra.

A brief reference to the facts will show that plaintiff is entitled to this rule.

(1) The defendant in error made a device and exhibited it to plaintiff in error; plaintiff in error approved of it, and procured a patent for the defendant in error.

(2.) The plaintiff in error subsequently made certain modifications in the device and applied it to its machines.

(3.) The defendant in error approved of such modifications, adopted them and claimed the device as within his patent.

(4.) The plaintiff in error, with full knowledge of the defendant in error's claim, and of the difference, if any, between defendant in error's device and the one used upon its machines, promised to pay defendant in error for the device it was using.

(*a.*) This appears explicitly in the testimony of the defendant in error (fols. 11, 12, 13).

(*b.*) Mr. Wood admits negotiating with the defendant in error for payment for the use of the oiler plaintiff in error was using; and also that plaintiff in error advertised the device to the world as a patented device, and that he (Wood) understood plaintiff in error was using plaintiff's device (fol. 21).

(5.) The plaintiff in error has enjoyed the monopoly of a concededly valuable device through its agreement with the defendant in error.

(6.) The defendant in error has, in reliance upon the acts and declarations of the plaintiff in error, refrained from licensing others or using any means to protect himself from loss (fol. 12).

(7.) If the plaintiff in error shall now be permitted to change its position or recall its declarations, the defendant in error will be greatly injured; the plaintiff in error is therefore estopped from so doing.

POINT V.

In a portion of our argument above we have assumed the existence of a federal question in the record or evidence, but it is respectfully submitted that there is no federal question in the case.

This is an action by a patentee against an exclusive licensee of the patent for its use. In such a case it is well settled that the invalidity of the patent is not a defense to an action for the recovery of royalties.

Bartlett v. Holbrook, 1 Gray, (Mass.,) 118.
Marston v. Swett, 66 N. Y., 207.
Marston v. Swett, 82 id., 526.
White v. Lee, 14 Fed. Rep., 791.
Walker on Patents, sections 306, 307.

A licensee by accepting a license is held in effect to have stipulated that the patent is valid between the parties to the *full extent of the claim therein contained.* For if the licensee may cut down the *patentee's claim* in any essential particulars by showing the "state of the art," or otherwise it may cut it out entirely.

The licensee's use therefore of a device *claimed* in the patent or any combination of elements covered by the claim, or the mechanical equivalent of such elements, is a use of the patent. This is so as a matter of reason and authority is not wanting.

Pope Manuf'g. Co., v. Owsley, 27 Fed. Rep., 108.
Starling v. St. Paul Plane Works, 32 Fed. R., 290.

It follows from this that there was no legitimate occasion upon the trial for the *construction* of the claim of the defendant in error's patent. The plaintiff in error by reason of its license or stipulation must abide by the *claim written in the patent;* and if it used the device *described* in such claim, or its mechanical equivalent, or one that would be an infringement upon the claim as written, it is liable as for the use of the defendant in error's device. This question was solely one of fact, and there is in the case plenty of evidence, (see testimony witnesses Spencer and Scott) to show as a fact, that the device used by the plaintiff in error is the mechanical equivalent of the device described in the defendant in error's patent, and the referee so found (case, fol. 67).

POINT VI

But if it may be assumed, that under any circumstances, the construction of the defendant in error's letters patent shall be deemed to have been legitimately a subject for examination and determination under the patent laws of the United States, upon the trial of this cause, and that judgment of State Court was necessarily based upon it, then it is respectfully submitted that the construction placed upon the claim of the patent by the learned referee, both in his findings and his opinion, is in strict accordance with the patent laws of the United States, and the defendant in error respectfully submits the considerations contained in said opinion in connection with the findings of the referee, for his views upon this question, deeming it unnecessary to add anything to the considerations there contained, and upon this ground he respectfully submits the judgment should be affirmed.

POINT VII

The writ of error herein should be dismissed for want of jurisdiction, or if the Court shall decide for any reason to entertain jurisdcction, then said judgment should be affirmed with damages and costs for the reason that said writ was sued out upon frivolous grounds, and for delay.

James Lansing

Counsel for Defendant-in-Error.